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Supreme Court of the United States

OCTOBER TERM 1906

NO. 260

HUGH WALLACE, WILL WALLACE, VERGE GOODWIN, ET. AL., Plaintiffs in Error,

vs.

MRS. ELLA ADAMS, FOR HERSELF AND AS NATURAL GUARDIAN AND NEXT FRIEND OF HENRY McSWAIN AND ROMA McSWAIN, HER MINOR CHILDREN,

Defendants in Error.

Brief for Plaintiffs in Error.

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PRESS OF M. J. PARKER, ARDMORE, I. T

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STATEMENT

There are two controlling questions in this case:

First: The nature and effect of certain decrees of the United States Courts for the Southern and Central Districts of the Indian Territory, admitting parties to membership in the Choctaw and Chickasaw Tribes of Indians under the act of June 10, 1896, which decrees were subse-

quently affirmed by the Supreme Court, under the Act of July 1, 1898.

Second: The constitutionality of the Act of July 1, 1902, creating the "Choctaw and Chickasaw Citizenship Court," and the validity of the decree of that court, rendered on the 17th day of December, 1902, purporting to vacate the former decrees.

It is deemed profitable, therefore, to refer, first, to the various acts of Congress, as well as to the reports of the Dawes Commission, that effect the question of citizenship in the Choctaw and Chickasaw Tribes.

On the 30th day of March, 1893 (27 Stat. 612, 645) Congress authorized the appointment of three commissioners to negotiate with the Five Civilized Tribes, "for the purpose of extinguishing the tribal title to their land, either by cession to the United States or by allotment in severalty among the members of such tribes." By the Act of March 2, 1895, (28 Stat. 939) two additional members were added to this Commission.

On March 29, 1894, the senate authorized its "Committee on the Five Civilized Tribes of Indians" to inquire into the condition of affairs in the Indian Territory, and report back to Congress, recommending such legislation as was desirable.

"The report of this committee, made May 7, 1894, called attention to the unsatisfactory state of affairs in the Indian Territory; stated that the lands were held by the Tribes in trust, for the benefit of their respective mebmers; that this trust was not being properly executed; that there was cause of complaint among the Indians as to the character of their own courts, and recommended that Congress address itself to the difficult task of settling the unsatisfactory conditions there existing. On November 20, 1894 and November 18, 1895 the Dawes Commisson made elaborate reports upon conditions in the Indian country. The Indian Governments were referred to in this language:

> "The commision is compelled by the evidence forced upon them during their examination into the administration of the so-called governments in this Territory, to report that these governments, in all their branchas, are wholly corrupt, irresponsible and unworthy to be longer trusted with the care and control of the money and other property of Indian citizens, much less their lives, which they scarcely pretend to protect."

Attenton was called to the fact that influential members of the tribes were holding large bodies of the public domain, and that the membership rolls of the tribes were being arbitrarily manipulated to the prejudice of the weaker members. The Commission declared:

"That if citizenship is left without control or supervision, to the absolute determination of the tribal authorities with power to decitizenize at will, the greatest injustice will be perpetrated, and many good and law abiding citizens reduced to beggary."

In response to this bitter arraignment of the Indian governments, Congress, in the Indian Appropriation Bill of June 10, 1896, enacted the following:

"That said commission is further authorized and directed to proceed at once to hear and determine the application of all persons who may apply to them for citizenship in any of said nations, and after such hearing they shall determine the right of such applicant to be so admitted and enrolled; Provided, however, that such application shall be made to such commissioners within three months after the passage of this act.

"The said commission shall decide all such applications within ninety days after the same shall be made.

"That in determining all such applications, said commission shall respect all laws of the several nations or tribes, not inconsistent with the laws of the United States, and all treaties with either of said nations or tribes and shall give due force and effect to the *rolls*, usages and customs of *each* of said nations or tribes: And provided further, that the rolls of citizenship of the *several* tribes as now existing

are hereby confirmed, and any person who shall claim to be entitled to be added to said rolls as a citizen of *either* of said tribes, and whose right thereto has either been denied *or not acted upon,* or any citizen who may within three months from and after the passage of this act, desire such citizenship, may apply to the legally constituted court or committee designated by the *several* tribes for such citizenship, and such court or committee shall determine such application within thirty days from the date thereof.

"In the performance of such duties, said commission shall have power and authority to administer oaths, to issue process for and compel attendance of witnesses, and to send for persons and papers, and all depositions and affidavits and other evidence in any form whatsoever heretofore taken where the witnesses giving said testimony are dead or now reside beyond the limits of said territory, and to use every fair and reasonable means within their reach for the purpose of determining the rights of persons claiming such citizenship, or to protect any of said nations from fraud or wrong, and the rolls so prepared by them shall be hereafter held and considered to be the true and correct rolls of persons entitled to the rights of citizenship in said *several* tribes, Provided, that if the *tribe* or any person be aggrieved with the decision of the tribal authorities or the commission provided for in this act, *it* or he may appeal from such decision to the United States District

Court, provided, however, that the appeal shall be taken within sixty days, and the judgment of the court shall be final.

"That the said commission, after the expiration of six months, shall cause a complete roll of citizenship of *each* of said nations to be made up from their records, and add thereto the names of citizens whose right may be conferred under this act, and said rolls shall be, and are hereby, made rolls of citizenship of said nations or tribes, subject, however, to the determination of the United States Courts, as provided herein."

Preliminary to a discharge of the duty thus cast upon the Dawes Commission, that body on July 8, 1896, adopted the following rules to govern the hearing and determination of applications for citizenship in any one of the Five Tribes.

"Any person desiring that said commission pass upon his claim to citizenship, in any of said tribes under provisions of this act, must make application in writing, signed and sworn to, containing a particular statement of the grounds upon which his claim is based, and accompanied by such evidence, in the form of affidavits, deposition, or record evidence, as he may desire to have considered in support of his claim, all to be forwarded under seal to the Commission at Vinita, I. T., before the tenth day of September, 1896.

"The application should state facts sufficient, if true, to show that the applicant is entitled to citizenship. The applicant must, at the same time furnish the *chief* or *governor* of the *nation in which citizenship is sought,* a copy of such application, and evidence, and shall furnish to the Commission evidence of this fact. Such *chief* or *governor* must, within thirty days thereafter, furnish the Commission *his* answer thereto, signed and sworn to by some duly authorized officer of his government, and accompanied by such evidence in the form of affidavits, depositions or record evidence as he may desire the Commission to consider in support of his answer. All argument shall be in writing.

HENRY L. DAWES, Chairman
FRANK G. ARMSTRONG
ALS. McKENNON
T. B. CABANISS
A. B. MONTGOMERY
Commissioners.

On the 28th day of June, 1898, Congress enacted what is generally known as the Curtis Act. Section twenty-nine of this Act ratified the agreement made by the Dawes Commission with the Choctaw and Chickasaw tribes, April 23, 1897; as amended by that Act, and which was subsequently ratified by a majority vote of the Choctaw and Chickasaw citizens. This agreement,

ERRATTA.

On page 8 of the brief, at the end of the quotation designated Section 11, insert the following:

Section 29 of the foregoing Act provided

> "That all the lands within the Indian Territory belonging to the Choctaw and Chickasaw Indians shall be allotted to the members of said tribes so as to give *to each member* of these tribes, so far as possible, a fair and equal share thereof, considering the character and fertility of the soil and the location and value of the lands."

which had for its purpose the winding up of the tribal affairs of the Chickasaw and Choctaw nations, contained the following provisions:

> (Sec. 11) "That when the roll of citizenship of any one of said Nations or Tribes is fully completed, as provided by law, and a survey of the lands of said Nation or Tribe is also completed, the commission heretofore appointed under Acts of Congress, and known as the Dawes Commission, shall proceed to allot the exclusive use and occupancy of the surface of all the lands of said Nation or Tribe susceptible of allotment, among the citizens thereof, as shown by said roll, giving to each, so far as possible, his fair and equal share thereof, considering the nature and fertility of the soil, location, and value of same. * * * * * * Provided further, that if the person to whom an allotment shall have been made shall be declared, upon appeal as herein provided for, by any of the Courts of the United States in or for the aforesaid Territory, to have been illegally accorded rights of citizenship, and for that or any other reason, declared not to be entitled to any allotment, he shall be ousted and ejected from said lands." (30 Stat. 495).

The same section provides:

> "That each member of the Choctaw and Chickasaw Tribes, including Choctaw and Chickasaw freedmen, shall, where it is possible, have the right

to take his allotment on land, the improvements on which belong to him, and such improvements shall not be estimated in the value of his allotment."

On July 1, 1898, Congress enacted the following provision:

"Appeals shall be allowed from the United States Courts in the Indian Territory direct to the Supreme Court of the United States to either party, in all citizenship cases, and in all cases between either of the Five Civilized Tribes and the United States involving the constitutionality or validity of any legislation affecting citizenship, or the allotment of lands, in the Indian Territory, under the rules and regulations governing appeals to said court in other cases; provided that appeals in cases decided prior to this act, must be perfected in one hundred and twenty days from its passage; and in cases decided subsequently thereto, within sixty days from final judgment; but in no such case shall the work of the commission to the Five Civilized Tribes be enjoined or suspended by any proceeding in, or order of, any court, or of any judge, until after final judgment in the Supreme Court of the United States. In cases of appeals, as aforesaid, it shall be the duty of the Supreme Court to advance such cases on the docket and dispose of the same as early as possible."

Thereupon numerous appeals were prosecuted to this court, and in the case of Stephens against the Cherokee

Nation, (174 U. S. 445) all the foregoing legislation was held to be constitutional.

The "Choctaw and Chickasaw Citizenship Court" was created and its jurisdiction defined by the following sections of the Act of July 1, 1902:

> Sec. 31—"It being claimed and insisted by the Choctaw and Chickasaw Nations that the United States Courts in the Indian Territory, acting under the Act of Congress approved June 10, 1896, have admitted persons to citizenship or to enrollment as such citizens in the Choctaw and Chickasaw Nations, respectively, without notice of the proceedings in such courts being given to each of said nations; and it being insisted by said nations that, in such proceedings, notice to each of said nations was indispensable, and it being claimed and insisted by said nations that the proceedings in the United States Courts in the Indian Territory, under the said act of June 10, 1896, should have been confined to a review of the action of the Commission to the Five Civilized Tribes, upon the papers and evidence submitted to such commissian, and should not have extended to a trial *de novo* of the question of citizenship; and it being desirable to finally determine these questions, the two nations, jointly, or either of said nations acting separately and making the other a party defendant, may, within ninety days after this agreement becomes effective, by a bill of equity filed in

the Choctaw and Chickasaw Citizenship Court hereinafter named, seek the annulment and vacation of all such decisions by said courts. Ten persons so admitted to citizenship or enrollment by said courts, with notice to one, but not to both of said nations, shall be made defendants to said suit as representatives of the entire class of persons similarly situated the number of such persons being too numerous to require all of them to be made individual parties to the suit; but any person so situated, may, upon his application, be made a party defendant to the suit. Notice of the institution of said suit shall be personally served upon the chief executive of the defendant nation, if either nation be made a party defendant, as aforesaid, and upon each of said ten representative defendants, and shall also be published for a period of four weeks in at least two weekly newspapers having general circulation in the Choctaw and Chickasaw Nations. Such notice shall set forth the nature and prayer of the bill, with the time for answering the same, which shall not be less than thirty days after the last publication. Said suit shall be determined at the earliest practicable time, shall be confined to a final determination of the questions of law here named, and shall be without prejudice to the determination of any charge or claim that the admission of such persons to citizenship or enrollment by said United States Courts in the Indian Territory was wrongfully obtained as provided in the next section. In the event said citizenship judgments or decis-

ions are annulled or vacated in the test suit hereinbefore authorized, because of either or both of the irregularities claimed and insisted upon by said nations as aforesaid, then the files, papers and proceedings in any citizenship case in which the judgment or decision is so annulled or vacated, shall, upon written application therefor, made within ninety days thereafter by any party thereto, who is thus deprived of a favorable judgment upon his claimed citizenship, be transferred and certified to said Citizenship Court by the court having custody and control of such files, papers and proceedings, and upon the filing in such Citizenship Court of the files, papers and proceedings in any such citizenship case, accompanied by due proof that notice in writing of the transfer and certification thereof has been given to the chief executive officer of each of said nations, said citizenship case shall be docketed in said Citizenship Court, and such further proceedings shall be had therein in that court, as ought to have been had in the court to which the same was taken on appeal from the Commission to the Five Civilized Tribes, and as if no judgment or decision had been rendered therein.

Sec. 32—"Said Citizenship Court shall also have appellate jurisdiction over all judgments of the courts in the Indian Territory rendered under said act of Congress of June tenth, eighteen hundred and ninety six, admitting persons to citizenship or to enrollment as citizens in either of said nations. The right of ap-

peal may be exercised by the said nations jointly, or by either of them acting separately, at any time within six months after this agreement is finally ratified. In the exercise of such appellate jurisdiction said Citizenship Court shall be authorized to consider, review and revise all such judgments, both as to findings of fact and conclusions of law, and may, wherever in its judgment substantial justice will thereby be subserved, permit either party to any such appeal to take and present such further evidence as may be necessary to enable said court to determine the very right of the controversy. And said court shall have power to make all needful rules and regulations prescribing the manner of taking and conducting said appeals and of taking additional evidence therein. Such Citizenship Court shall also have like appellate jurisdiction and authority over judgments rendered by such courts under the said act denying claims to citizenship or to enrollment as citizens in either of said nations. Such appeals shall be taken, within the time hereinbefore specified, and shall be taken, conducted and disposed of in the same manner as appeals by the said nations, save that notice of appeals by citizenship claimants shall be served upon the chief executive officer of both nations;

"*Provided, that paragraphs thirty one, thirty two and thirty three shall go into effect immediately after the passage of this act of Congress.*

Sec. 33—"A court is hereby created to be known

as the Choctaw and Chickasaw Citizenship Court, the existence of which shall terminate upon the final determination of the suits and proceedings named in the last two preceding sections, but in no event later than the thirty first day of December, nineteen hundred and three. Said court shall have all authority and power necessary to the hearing and determination of the suits and proceedings so committed to its jurisdiction, including the authority to issue and enforce all requisite writs, process and orders, and to prescribe rules and regulations for the transaction of its business. It shall also have all the powers of a circuit court of the United States in compelling the production of books, papers and documents, the attendance of witnesses and in punishing contempt. *Except where herein otherwise expressly provided the pleadings, practice and proceedings in said court shall conform as near as may be, to the pleadings, practice, and proceedings, in equity causes in the Circuit Court of the United States.* The testimony shall be taken in court or before one of the judges, so far as practicable. Each judge shall be authorized to grant, in vacation, or recess, interlocutory motions not affecting the substantial merits of the case. Said court shall have a chief judge and two associate judges, a clerk, a stenographer, who shall be deputy clerk, and a bailiff. * * * * * * The clerk of the United States Court in the Indian Territory, having custody and control of the files, papers

and proceedings in the original citizenship cases shall receive a fee of two dollars and fifty cents for transferring and certifying to the Citizenship Court the files, papers and proceedings in each case, without regard to the number of persons whose citizenship is involved therein, and said fee shall be paid by the person applying for such transfer and certification. The judgment of the Citizenship Court in any or all of the suits or proceedings so committed to its jurisdiction shall be final. All expenses necessary to the proper conduct, on behalf of the nations, of the suits and proceedings provided for in this and the two preceding sections shall be incurred under the direction of the executives of the two nations, and the Secretary of the Interior is hereby authorized, upon certificate of said executives, to pay such expenses as in his judgment are reasonable and necsssary out of any of the joint funds of said nations in the Treasury of the United States." (32 Stat. 641)

Acting under the authority sought to be conferred by this act, the Choctaw and Chickasaw Nations instituted a suit in the Citizenship Court, styled upon the docket thereof, "The Choctaw and Chickasaw Nations or Tribes of Indians vs. J. T. Riddle, et. al." On the 17th day of December, 1902, that court rendered its decree, wherein it held that in the proceedings in the Unised States Courts, wherein parties were admitted to citizenship, it was indispensable that both the Choctaw and Chickasaw

Tribes should be parties to such litigation, and that the proceedings of those courts should have been confined to a review of the testimony before the Dawes Commission. It was held that the alleged errors were sufficient to authorize the vacation of the decrees rendered by the United States Courts, and a decree was accordingly entered, that all such judgments "be set aside, annulled, vacated and held for naught." (R. 9-10) Hill was not a party to this suit, nor did he apply for a transfer to the Citizenship Court, of the action in which he had procured a decree admitting him to citizenship.

The Act of May 2, 1890, put in force in the Indian Territory the Constitution of the United States, "to have the same force and effect as elsewhere in the United States." (26 Stat. 81.)

By the Act of March 3, 1901, all Indians in the Indian Territory were made citizens of the United States. (31 Stat. 1447.)

Section 5033 Mansfield's Digest, of the Statutes of Arkansas, put in force in the Indian Territory provides that:

> "The defendant may set forth in his answer as many grounds of defense, counter-claim and set-off, whether legal or equitable, as he shall have."

Section 4929 provides:

> "Where the action has been properly commenced by proceedings at law, either party shall have the right, by motion, to have any issue which heretofore was exclusively cognizable in chancery tried in the manner hereinafter prescribed in cases of equitable proceedings, and if all the issues are such as heretofore were cognizable in chancery, though none were exclusively so, the defendant shall have the right to have them all tried as in cases of proceedings in equity."

The complaint and answer disclose the following state of facts: This is an action of ejectment, brought by Henry and Roma McSwain, who are minors, through their parent, Ella Adams, as next friend, to recover a tract of land in the Chickasaw Nation, Indian Territory. The plaintiffs based their right to recover upon the fact, that in September 1904, upon their application, the land was regularly allotted to them by the Dawes Commission. The plaintiffs were never in possession of the land, but the title thus declared upon is admitted to be sufficient to sustain the action, unless the answer of the defendants disclosed a superior right of possession. All the defendants, except Hill, disclaimed title, and justified their holding through him. Hill claimed right to the possesion by

virtue of a decree of the United States Court for the Southern District of the Indian Territory, rendered under the Act of June 10, 1896.

Hill is a Choctaw Indian by blood, but his right to membership in the Tribe was disputed by the tribal authorities, and accordingly, on the 10th day of August, 1896, he presented his application to the Dawes Commission to be enrolled as a citizen thereof. In this application, he complied in all things, with the foregoing rules promulgated by the Commission.

In November, 1896, his application was rejected by the Commission, and thereafter, in the same month, he appealed to the United States Court for the Southern District of the Indian Territory. His cause was regularly docketed, and referred to a Master, to take proof. On the 21st day of February, 1898, the Master made his report, and on the 8th day of March in the same year, the cause came on for final hearing, when the court entered a decree, declaring Hill to be a member of the Choctaw Tribe of Indians by blood, and entitled to "all the rights, privileges and immunities of other members of the Tribes."

After the rendition of this decree and in the same month, he took possession of the land in controversy,

claiming it as his allotment. He was still in possession at the date of the passage of the Curtis Act, June 28, 1898; and had, in the meantime erected permanent improvements thereon, consisting of fencing, houses, etc., of the value of not less than $1,000. Thereafter, the Choctaw Nation appealed to the Supreme Court, where the case was affirmed (Stephens vs. Cherokee Nation, *supra*). In the year 1898, (the exact date not appearing in the record) he exhibited to the Dawes Commission a copy of the decree of the United States Court admitting him to citizenship, and asked to be enrolled as a member of the Choctaw Tribe.

It does not appear that any action was taken by the Commission upon this application, until in the year 1904 when he was finally refused enrollment, the Commission assigning as a reason for its action, that the decree of the United States Court admitting him to citizenship, had been vacated by the decree of the Choctaw-Chickasaw Citizenship Court, entered in the case of the Choctaw and Chickasaw Nations vs. J. T. Riddle, *supra*.

During all this time, Hill had remained in possession of the land, claiming the same as his allottment, and in the meantime, had placed thereon other improvements, of the

value of $1,000. As has been stated, Hill was not a party to the suit before the Citizenship Court; was not served with notice of the proceedings had therein, nor was his case transferred to that court, under section 31 of the Act of July 1, 1902. The plaintiffs have never been in possession of the land, have never claimed to own any of the improvements thereon, but, upon the contrary, when they had the land allotted to themselves, they knew of Hill's possession, and claim to ownership, and made no effort to compensate him for the improvements he had placed thereon. Hill, in his answer, asked that the cause be transferred to the equity side of the docket, that plaintiff's allotment be canceled, that he be quieted in his title to the land, and for such other equitable relief as he was entitled to.

The plaintiffs demurred to this answer; the demurrer was sustained, and the defendants declining to plead further, judgment was rendered for the plaintiffs.

The defendant's contention was that the Act of July 1, 1902, which created the Citizenship Court, and authorized it to vacate the decrees of the United States Courts which had been affirmed by this court, was unconstitutional; that the decree of the Citizenship Court wherein it

sought to vacate the decrees of the United States Courts, admitting parties to citizenship, was of no effect; and that, consequently, the decree which the defendant Hill had procured, admitting him to citizenship in the Choctaw Tribe was still in full force and effect. The cause was taken to the Indian Territory Court of Appeals where on June 16, 1905, that court rendered the following opinion:

> "The main question presented by this appeal is one involving the constitutionality of sections 31, 32 and 33 of the Act of July 1, 1902."

The court here copies the three sections referred to, and thus concludes its opinion:

> "This court, after examination of the record, is of opinion Congress had the power to enact the provisions above set out and they are not in conflict with the Constitution of the United States, and the opinion of the Court below is, therefore affirmed."(R. 21-24).

The case was then taken to the United States Circuit Court of Appeals for the Eighth Circuit, where on the 21st day of February, 1906, it was again affirmed. (R. 31-43.)

The very able opinion of that court, rendered by Judge Sanborn, held that the question of membership in the

Indian Tribes was a political one, over which Congress had plenary power, and that the United States Courts in the Indian Territory, as well as the Supreme Court, were exercising *legislative* and not *judicial* power, in the determination of the same. The following excerpts from this opinion are interesting and present, in a nutshell, the grounds upon which it was based:

> "It (Congress) might have determined this issue itself, and have declared by direct enactment that the defendant, Hill, was a citizen of the Choctaw Nation. It might have empowered a committee, an Indian agent, a commission, a board or a court, to examine and determine that question on its behalf, and as the determination of this question of citizenship was a purely *legislative* and *administrative* function and not a *judicial* one, Congress necessarily had the authority under the Constitution at any time before an allottment of land under its previous acts had been finally made to the defendant, and his right to the land had thereby become vested, to repeal its previous legislation, to change its method of determining the issue, *to strike down any decision that had been made under its previous acts,* to prescribe a new method of deciding the question, or to refuse to determine it altogether and leave the claim of the defendant as it found it, conclusively barred by its rejection by the Choctaw Nation.

"* * * * * * The fact that the effect of the Act of July 1, 1902, has been to avoid final judgments of the United States Courts in the Indian Territory, which had been affirmed by the Supreme Court, has not been disregarded. In the rendition of those judgments, however, those courts were not exercising any of the judicial power of the United States conferred by the third article of the Constitution. They were not constitutional, but Legislative Courts of the United States, exercising a jurisdiction conferred upon them by Congress by virtue of the sovereignty of the nation and of section 3 of article 4 of the Constitution, which empowers Congress to dispose of, and make all needful rules and regulations respecting the territory belonging to the United States. * * * * * *

"Now as the power conferred upon the courts in the Indian Territory and upon the Supreme Court respecting the decision of the question, who were citizens of the Indan Tribes, was purely *legislative* and *administrative* and the entire question still remained subject to congressional action, the legislative department had the same power, at any time before allottments were made and the rights of allottees became vested, to disregard, or to authorize a review of the decisions of these courts by other tribunals, that it would have had to have disregarded or reviewed the decisions of an Indian agent, a commission, or a committee, if it had conferred this power upon them. * * * * * * * * *

"The suggestion that the Citizenship Court was a commission and not a judicial tribunal is immaterial, because the power of the legislative department of the Government to authorize the review of the judgments of citizenship by a committee, a commission, or an agent was as complete as it was to authorize that review by a court. *It had plenary authority to review the judgments itself or to create or select a tribunal to its liking for the purpose.* * * * * * * * The power conferred upon the Dawes Commission and the United States Courts in the Indian Territory by the Act of June 10, 1896, and upon the Supreme Court by the Act of July 1, 1898, to determine who were citizens of the Choctaw and Chickasaw nations, was *legislative* and not *judicial* and all judgments and proceedings thereunder were subject to any subsequent legislation of the United States respecting the question of citizenship, which was enacted before allotments of land were made to the successful litigants under the previous legislation."

ASSIGNMENT OF ERRORS

The following is the assignment of errors filed in the United States Circuit Court of Appeals:

"First—Said Circuit Court of Appeals erred in entering judgment affirming the judgment of the

United States Court of Appeals for the Indian Territory, and the judgment of the United States Court for the Southern District of the Indian Territory, for the tract of land containing two hundred and seventy acres, described upon the record in said cause, and cost of suit, entered on the 21st day of February, 1906, in favor of said defendants in error and against said plaintiffs in error.

"Second—Said Circuit Court of Appeals erred in not reversing the said judgment of the United States Court of Appeals for the Indian Territory, and of the United States Court for the Southern District of the Indian Territory, and in not remanding said cause to the said United States Court for the Southern District of the Indian Territory.

"Third—The said Circuit Court of Appeals erred in not sustaining the first assignment of error upon the record in said cause.

"Fourth—The said Circuit Court of Appeals erred in not sustaining the Second Assignment of error upon the record in said cause.

"Fifth—The said Circuit Court of Appeals erred in not sustaining the third assignment of error, upon the record in said cause.

"Sixth—The said Circuit Court of Appeals erred in not sustaining the Fourth Assignment of Error upon the record in said cause.

"Seventh—Said Circuit Court of Appeals erred in not sustaining the fifth assignment of error upon the record in said cause.

"Eighth—The said Circuit Court of Appeals erred in holding that the power conferred upon said United States Courts in the Indian Territory by the Act of June 10, 1896, and upon the Supreme Court of the United States, by the Act of July 1, 1898, was legislative and not judicial, and that all judgments and proceedings of said courts were subject to be set aside by subsequent legislation.

"Ninth—Said Circuit Court of Appeals erred in holding that the judgments declaring parties to be entitled to Indian citizenship, under the Act of June 10, 1896, and which were affirmed by the Supreme Court, under the Act of July 1, 1898, were not the result of the exercise of judicial power, and that said legislative department 'had the same power at any time before allotments were made, and the rights of allottees became vested, to disregard or to authorize a review of the decisions of those courts, by other tribunals, that it would have had to have disregarded or reviewed the decisions of an Indian Agent, a Commission, or a Committee, if it had conferred this power upon them.'

"Tenth—The said Circuit Court of Appeals erred in holding that the plaintiff in error, Hill, who took possession of, and erected valuable improvements upon the land in controversy in this action, by virtue of a judgment of the United States Court for the Southern District of the Indian Territory, declaring him to be a member of the Choctaw Tribe of Indians, (which judgment was affirmed by the Supreme Court

of the United States), took no vested interest in the lands in controversy, and that Congress had the right thereafter to authorize any subordinate tribunal to set aside the judgments of said courts, and to deprive the plaintiff in error of said land, without compensation.

"Eleventh—Said Circuit Court of Appeals erred in failing to hold that the two questions which were submitted to the determination of the Choctaw and Chickasaw Citizenship Court, by the Act of July 1, 1902, had already been determined by the judgment of the Supreme Court in the case of Stephens vs. Cherokee Nation, 174 U. S. 445, and had thus become *res judicata*.

"Twelfth—Said Circuit Court of Appeals erred in holding that 'Claimants of citizenship, who secured judgment in their favor, which were final under the Acts of 1896 and 1898, when they were rendered and took possession of and demanded suitable tracts of land as their allotments before their judgments were made reviewable, acquired no vested rights therein against subsequent legislation enacted before allotments were made to them.'

"Thirteenth—The said Circuit Court of Appeals erred in holding that 'The act of July 1, 1902, whereby a Citizenship Court was created and empowered to review the final judgments of the courts of the United States, under the Act of June 10, 1896, which had been affirmed by the Supreme Court under the Act of July 1, 1898, was constitutional and

impregnable to the attacks of the successful litigants who had not secured allotments of land before its passage."

ARGUMENT

The assignment of errors presents but one question. If the decree of the Choctaw-Chickasaw Citizenship Court in the test case known as the Riddle case, vacated the decree that defendant, Hill, had therefore procured in the United States Court for the Southern District of the Indian Territory, wherein he was adjudged to be a member of the Choctaw Tribe of Indians, this case should be affirmed. If it did not, it should be reversed. We believe the decree, establishing defendant's citizenship, was in no wise affected by the so-called decree of the Citizenship Court, and shall now state, as briefly as we can, the different reasons that lead to this conclusion.

FIRST

We contend that the Citizenship Court was not a *Court*, but a *Commission*; that it was but an arm of the administrative branch of the government; that it could not exercise judicial functions, and therefore could not vacate a decree entered by the regularly established courts. It

is true that the Circuit Court of Appeals declined to determine whether the Citizenship Court was a *Commission* or a *Court*. It is clear, however that the reasoning of that court would logically have led it to the conclusion that the Citizenship Court was not a judicial tribunal, if the learned judge who rendered the opinion had felt called upon to decide that question. That court, having decided that the United States Courts in the Indian Territory and the Supreme Court, in determining questions of Indian citizenship were, themselves, not acting as courts, but practically as commissions, it must inevitably follow, if this conclusion is correct, that the Citizenship Court, in exercising the jurisdiction conferred upon it, was likewise performing legislative and not judicial functions.

We shall undertake, hereafter in this brief, to show that the courts in the Indian Territory and the Supreme Court, *were* exercising judicial powers. Assuming therefore for the present, that the decree admitting Hill to citizenship was the result of the exercise of judicial power, let us examine the nature, jurisdiction and power of the Citizenship Court, to determine whether or not *it* was capable of exercising such judicial functions, as to authorize it to vacate this decree.

It would seem that the opinion of this court in *Ex Parte* Joines (191 U. S. 93) is a sufficient answer to this question.

Joines, so far as his Indian citizenship was concerned, was in a situation exactly similar to that of Hill in this case. He had been admitted to Chickasaw citizenship by the United States Court for the Southern District of the Indian Territory, his case had been appealed by the the Chickasaw Nation, to the Supreme Court and affirmed. In the Riddle case, *supra*, the Citizenship Court had undertaken to vacate the decree admitting him to citizenship. Thereafter, a petition was filed in this court, asking for a writ to prohibit the Citizenship Court from giving any further effect to its decree, or from certifying the same to the Dawes Commission. A rule was issued, requiring the members of the Citizenship Court to show cause why the writ of prohibition should not issue. In their response to this, the members of the that Court said:

> "There is nothing in the judgment of said Citizenship Court, in the test case, known as the Riddle case, nor did or does, the law in that behalf authorize said court to include or place in said judgment anything, by any *command* or *order* of said Citizenship Court, to *affect* or *control* the *acts*, or

any *act*, or *conduct* of the Commission to the Five Civilized Tribes, and therefore when the judgment was certified by said Citizenship Court, as a matter of *advice* merely, and not of *command*, to the Commission to the Five Civilized Tribes, the whole matter had passed beyond the jurisdiction and control of the Citizenship Court, so far as the said test case was and is concerned, as nothing further remained to be done in respect thereto by said Citizenship Court, as not even an execution for costs could be issued, the officers of said court being prohibited from charging or collecting any costs, and the marshal's fees and those of witnesses were, and are, to be paid by the respective parties, and in advance; and furthermore no provision exists, or was made by the act creating the court for the issuance of any execution for costs."

The Choctaw and Chickasaw Nations, through their attorneys, Mansfield, McMurray & Cornish, filed what was called a "reply" to the petition, in which they say:

"Said Choctaw and Chickasaw Citizenship Court is not a part of the established judicial system of the United States of America, over which this honorable court has jurisdiction, but that said court is a special legislative tribunal established by the Act of Congress, referred to in said petition, for the purpose of overcoming the difficulties in the administration of the affairs of the Choctaw and Chickasaw

> Nations, or Tribes of Indians, encountered by the executive department of the government of the United States, in carrying out the general policy of the government of the United States, to cause the lands of said Indians to be allotted among them in severalty, and to ultimately create a state of the Union out of the area embraced within the lands of the Five Civilized Tribes; and that such action is *political* and *executive* in its nature and not the proper subject of *judicial inquiry* or interference."

In their brief, these gentlemen use the following language.

> "We respectfully urge that the Choctaw and Chickasaw Citizenship Court is a special legislative tribunal, which should be considered as a part of the executive department of the government, engaged in carrying out the Indian policy of the United States and that, as such, its duties should be considered *political* in their nature and not the proper subject of judicial inquiry."

The Solicitor General, Henry M. Hoyt, filed a brief on behalf of the United States, in which he says:

> "The Choctaw and Chickasaw Citizenship Court, *like the Dawes Commission,* is a *political agency,* created by Congress in furtherance of the plan outlined in the Act of March 3, 1893, to-wit, the extinguishment of the National and Tribal title to lands within the Indian Territory."

It is clear, from these statements, that the issue as to whether the Citizenship Court was a commission or a court was, in this case, clearly made. The petitioner claimed that, unless prohibited, the Citizenship Court would gtve still further effect to its decree, and prohibit, if necessary, the Dawes Commission from enrolling him as a member of the Chickasaw Tribe of Indians.

The members of the Citizenship Court contended that that body had exhausted its jnrisdiction. That it had no power to compel the Dawes Commission to obey its decree; that it had certified its decree to that Commission, not as a *command*, but as a matter of *advice*, only. The substance of this answer was clearly this: that the Citizenship Court, in determining the two questions submitted to it, had acted only in an advisory capacity; that it had no authority to enforce its decree; and that the Dawes Commission was free either to accept this advise or to reject it. Is it not clear that this court agreed with the contentions of the respodents in that case? It is true that this court did not, in direct language, say that the Citizenship Court was incapable of exercising judicial power. It *did* hold, however, that the Citizenship Court had exhausted its jurisdiction, and that there was, therefore, nothing that

this court could prohibit. This is the language of the Court.

> "We need not consider whether the Citizenship Court is a court in such a sense as to be subject to prohibition. See *re vidal*, 179 U. S. 126, 45 L. ed. 118, 21 Sup. Ct. Rep. 48; Gordon vs. United States, 2 Wall. 561, 17 L. ed. 921, 117 U. S. 697 702. However, these things may be, it is clear that the writ will not issue after the cause is ended, and that the cause in the Citizenship Court was ended, before the present application was heard. *It is stated correctly by the answer that the act does not empower the Citizenship Court to do anything in the test case beyond rendering its judgment and certifying the same as it has done.*"

We submit that the net result of this court's holding in the Joines case is, that the Citizenship Court had no power to enforce its decree at the hands of the Commission, that its decree was purely *advisory*, and that the Commission could act upon this advice in such manner as its own judgment might dictate.

It is perhaps permissible just here to call specefic attention to the case of Gordon vs. United States, cited by Justice Holmes in the Joines case.

In 1863, Congress passed an act, amending the act establishing the court of claims. It was provided that in any cause wherein judgment was rendered in the Court of Claims, where the amount in controversy exceeded three thousand dollars, an appeal might be taken to the Supreme Court. Provision was made, that, when judgment for any amount was affirmed by the Supreme Court, a copy of the judgment should be certified by the clerk of the court of claims, signed by the Chief Justice, and presented to the Secretary of the Treasury, and thereupon paid out of any general appropriation made for the payment of claims. Section 14 of the act provided that no money should be paid out of the Treasury upon such judgments, until an appropriation therefor should be estimated for by the Secretary of the Treasury. Upon an appeal from the court of claims to the Supreme Court, Chief Justice Taney says:

> "Neither the court of claims, nor the Supreme Court, can do anything more than certify their opinion to the Secretary of the Treasury, and it depends upon him, in the first place, to decide whether he will include it in his estimate of private claims; and if he should decide in favor of the claimant, it will then rest with Congress to determine whether they will or will not make an appropriation for its payment.

> Neither court can, by any process, enforce its judgments, and whether it is paid or not, does not depend on the decision of said court, but upon the future action of the Secretary of the Treasury and of Congress."

The court holds that the court of claims might be properly required in the first instance to pass upon the validity of claims against the United States.

> "In this respect, the authority of the court of claims is like to that of an Auditor or Comptroller, with this difference only; that in the latter case the appropriation is made in advance, upon estimates furnished by the different executive departments, of their probable expense during the incoming year; and the validity of the claim is decided by the officer appointed by law for that purpose, and the money paid out of the appropriation afterwards made. In the case before us the validity of the claim is to be first decided, and the appropriation made afterwards. But in principle there is no difference between these two special jurisdictions created by Acts of Congress for special purposes, and neither of them possesses judicial power in the sense in which those words are used in the Constitution. The circumstance that one is called a court and its decisions called judgments cannot alter its character nor enlarge its power."

After discussing the equality of the three departments of government, and the absolute independence of the judicial department, the learned Judge proceeds:

"The appellate power and jurisdiction are subject to such exceptions and regulations as the Congress shall make. But the appeal is given, only from such inferior courts as Congress may ordain and establish to carry into effect the judicial power specifically granted to the United States. The inferior court therefore, from which the appeal is taken, must be a judicial tribunal, authorized to render a judgment which will bind the rights of the parties litigating before it, unless appealed from, and upon which the *appropriate process of execution may be issued by the court to carry it into effect.* And Congress cannot extend the appellate power of this court beyond the limits prescribed by the Constitution, and can neither confer nor impose upon it the authority or duty of hearing and determining an appeal from a Commissioner or Auditor ,or any other tribunal exercising only special powers under an Act of Congress, nor can Congress authorize or require this court to express its opinion on a case where its judicial power could not be exercised, and where its judgment would not be final and conclusive upon the rights of the parties, and process of execution awarded to carry it into effect. The award of execution is a *part* and an essential part of every judgment passed by a court exercising judicial power. *It is no judgment, in the legal sense of the term, without it.* Without such an award, the judgment would be inoperative and nugatory, leaving the aggrieved party without a remedy. It would be

merely an opinion, which would remain a dead letter, without any operation upon the rights of the parties unless Congress should at some future time sanction it, and pass a law authorizing the court to carry its opinion into effect."

SECOND.

If it should be conceded that the Citizenship Court was a judicial body, then, its decree, wherein it sought to set aside the decrees admitting parties to citizenship, is insufficient to accomplish that purpose as to any other than the ten defendants in that case. Hill's answer shows that he was not a party to that suit, and that no testimony was introduced to show that he was situated similarly to the ten defendants therein named. The plaintiff's demurred admitted this allegation to be true. Was the decree, therefore, of the Citizenship Court sufficient to vacate the decree of Hill, which admitted him to citizenship?

The Act of Congress, authorizing this test suit, provided, that ten parties who had procured decrees, with notice to one, but not to both of the tribes, should be made defendants, as representative of all parties *similarly*

situated. It does not provide, however, for any defendants who were representative of parties who had tried their cases *de novo* in the Territorial courts. It might well be that parties having favorable decrees, had served both Governors with notice of the proceedings, so as to meet all objections that were urged on account of lack of notice to both tribes, but that their cases were tried *de novo.* There was no provision in the bill for any one to represent this class of people. No testimony being introduced in the Riddle case, to show that this defendant was situated similarly to the defendants therein, this court cannot, nor could the trial court, presume that they were so situated. ***A judgment that does not identify the party sought to be affected thereby is a nullity.*** The judgment in the Riddle case does not in express terms, attempt to set aside the judgment of defendant, Hill. If he had been situated similarly to the defendants in that suit, it was a matter easily ascertained, and it was the duty of the Citizenship Court to determine that question, *upon the proof.* Conceding now, for the sake of argument, that the Citizenship Court was a judicial tribunal, the question, whether the defendant Hill was situated similarly to the ten defendants, was a ques-

tion of fact, to be judicially found by that court. No other tribunal could inquire into that matter. The Citizenship Court could not *assume* this to be a fact. This question was as much submitted to the determination of that body as any other question. The act of Congress did not undertake to determine how many of the court claimants were affected by the two supposed irregularities. That matter was remitted to the determination of the Citizenship Court. No effort was made to bring the defendant into that court by service of process, though he was within its jurisdiction. It must, therefore, be true that the decree as to him is void.

> "To constitute a valid judgment, the record of it must contain sufficient certainty and precision to enable the clerk to issue an execution by inspection of the entry, without reference to other entries." (Captain of Steamer, Mollie Hamilton. 9th Heisk 203).

The judgment therein failed to disclose the name of the party affected, and was accordingly held void.

Black, on judgments, volume 1, section 116, states:

> "That a judgment will be sufficient if the name of the party to be affected thereby can be ascertained from other parts of the record."

If this cannot be done, however, he holds that the

judgment is void. And why should not this be the law? If A, whose name appears nowhere in the record, is to be affected by a judgment therein rendered, why may not B and C and D, be likewise affected? The very purpose of a decree is to settle, within itself, the rights of parties, and in the very nature of things, it must designate the parties to be affected thereby. We submit, that there is nothing in the decree in the Riddle case, that can affect the rights of any party, except the ten parties therein defendants. No living man can tell from that decree, whether there was any other party similarly situated. It may well be, that no other court claimant was situated similarly to the ten defendants in that case, or upon the contrary, it might be that *all* the members of the Choctaw and Chickasaw Nations were similarly situated. The ascertainment of that matter was a question of fact that could be determined by no tribunal other than the Citizenship Court. A judgment, being a matter of record, is notice to all the world, as to the rights of parties affected thereby. There must be, within the different parts of the record, sufficient identification of the parties whose rights are thereby affected, to enable a third party to judge, from an inspection of the record,

who are the parties to the controversy. Conceding for the present, that Congress had the right to bind three thousand Indian citizens, by a proceeding against only ten, it still devolved upon the court to ascertain, and to judicially determine, whose decrees they were vacating. The defendant's name nowhere appears in any part of the record in that case. We believe that this judgment must be held void as to every one not made a party thereto.

Did Congress, however, have the right to provide that the court claimants should be represented by the ten defendants named in that suit? These court claimants lived within the jurisdiction of the citizenship court. The Act of Congress does not assert that they cannot be served with process. It simply states that they were too numerous to be made parties. This was a judicial fact to be determined by the courts, and not by the legislative department of the Government. It is now well settled that no person can be bound by a personal judgment unless he is made a party to the action. One exception to the rule is, that courts of chancery where all the parties cannot be brought in, may make an order, requiring a few to defend for all. This is a rule for the court to promulgate, however, and not the legislature. If the ten parties

within the jurisdiction of the Citizenship Court could be served with process, there is no reason why all could not be served. The question of convenience should not be permitted to supplant the most essential of all judicial requirements, viz: that no man's property shall be taken without a hearing. In this case, the defendant's property which he is occupying, by virtue of his decree is confessed to be worth more than $5,000. A suit is instituted before a commission, and an omnibus decree is rendered, undertaking to deprive him of all this property, without a hearing, and without a finding that his decree was, [redacted], defective or irregular. If people's property is thus subject to the will of Congress, we submit that no man is safe in his holdings.

Before Hill could be affected by the decree of the Citizeship Court, he should have been made a party thereto, and it should have been found by that body that his decree was defective, because of the irregularities complained of. The Citizenship Court had no right or authority to *assume* that he was situated similarly to the other defendants.

In the case of Harwood vs. G. & O. Railroad Co., 84 U. S. 78, a bill was filed to vacate a decree rendered

in the same court, in a suit by Carlisle against the C. & O. Railroad Company. The suit by Carlisle was to foreclose a mortgage on the road. The second suit alleged fraud and collusion between the plaintiff in the first suit and his confederates. It was alleged that they had entered into a conspiracy, by which the road was permitted to fall into decay; that the interest on the bonds was wilfully neglected, in order that the property might be sold under that mortgage; that the conspiracy was carried out, the road sold for a small sum, and the stockholders of the road thereby injured. In the suit to vacate this decree, the original plaintiff, Carlisle, was not made a party. Mr. Justice Hunt, speaking of this says:

> "Mr. Carlisle, the plaintiff in the suit in which the decree is sought to be vacated, is not a party to this proceeding. In the former suit all the forms of law, at least, were complied with. The parties having interest sought to be foreclosed were made parties, a decree was then taken in the ordinary form, that they be foreclosed, and that the property be sold. A sale was had, under which the present defendants claim title. This was done upon prayer of Mr. Carlisle, by his authority and upon his procurement. Third parties now come into court and ask that all these proceedings, complete according to the forms of law, and sanctioned by the decree of the court

taken at the request of Mr. Carlisle, and for which he is responsible, be vacated and declared fraudulent and void. This is sought to be done without his knowledge, and no opportuity is geven to him to sustain his decree or to rebut the alleged fraud, and no reason or excuse is given why he is not made a party. This is against authority and principle. No case is cited to justify it, and it is believed that none can be found. The judgments of courts of record, would be scarcely worth obtaining if they could thus be lightly thrown aside. *The absense of the plaintiff in the original suit is a fatal defect.*"

Apply this doctrine to the case at bar. Hill, though within the jurisdiction of the Citizenship Court, was not made a party in the Riddle case. He was given no opportunity to show that the decree under which he claimed was valid. He was not given an opportunity to show that he was not situated similarly to the ten defendants in that suit. The tribes, who brought that suit in the Citizenship Court did not introduce any testimony to show that he was so situated; and the omnibus finding of that court, without a line of testimony, that the defendant was so situated, is such an inconceivible misconception of the law, that the defendant cannot be effected thereby.

One of two things *must* have occurred, before he

could have been bound by that decree. Either he must have been made a party to that suit, and given an opportuity to show that he was not situated similarly to the defendants therein, or else it was incumbent on the Choctaw and Chickasaw Nations, who were seeking to vacate his judgment, to show *by proof* in that proceeding, that he was so situated.

If there had been any testimony upon this question it might be contended that the findings of the court would be binding until reviewed. It is admitted by the demurrer, however, that *not one word of testimony was introduced upon this question,* and that the finding by the Citizenship Court that he was so situated was an *erroneous assumption* of fact.

THIRD

The Act of July 1, 1902, which established the Citizenship Court, submitted to the determination of that body two questions:

> "First— Was it indispensable that both the Choctaw and Chickasaw Nations should be made parties to proceedings in the United States Courts, wherein parties were admitted to Indian Citizenship; and,

"Second—Should the proceedings in those courts have been confined to a review of the testimony taken before the Dawes Commission."

"It will be remembered that the Citizenship Court determined both these contentions in favor of the tribes, and held that they were so fundamental in their character as to render all decrees admitting parties to citizenship, void."

We contend that these two questions were in issue in the various cases that came to this court from the United States Courts in the Indian Territory admitting parties to Choctaw and Chickasaw citizenship, and that those questions were forever set at rest by the opinion of this court in the case of Stephens vs. the Cherokee Nation, (*supra.*) It will be remembered that the rules promulgated by the Dawes Commission required applicants for citizenship to make the Governor of the tribe in which citizenship was sought a party to the proceedings. The Choctaw and Chickasaw Nations were separate political communities each having a government, consisting of a legislative, executive and judicial department.

In the proceedings before the Dawes Commission and before the United States Courts in the Indian Territory, these tribes were treated as different political entities.

The government of the United States, in its dealings with these tribes had always so regarded them. Each tribe had always exercised the right to determine its own citizenship, so that membership in one tribe was a matter with which the other had no concern. After the courts in the Indian Territory had finally determined all applications for membership, more than one hundred and fifty cases were, by these two tribes, appealed to this court under the Act of July 1, 1898.

In some of these cases, it was the Chickasaw Tribe that appealed, and in some it was the Choctaw Tribe. While neither of the tribes at that time thought the matter of sufficient importance to contend, that both the tribes should have been parties to the proceedings in the courts in the Indian Territory, it is clear that they were at liberty to make this contention, in those proceedings, and, having the right to do so, they were clearly bound to bring forward every argument that could be urged against the constitutionality of the legislation that authorized the Dawes Commission and the United States Courts in the Indian Territory to determine questions of citizenship in the Choctaw or Chickasaw Tribes.

As these questions were at isssue in those cases and

were finally concluded by the opinion of this court in the Stephens case, it cannot be successfully contended that Congress had the power to submit them to re-examination by the Citizenship Court. We believe we are safe in making the statement, that Congress cannot, constitutionally, submit the opinions of the Supreme Court to review by other and subordinate tribunals. In the Gordon case (*supra*). Chief Justice Taney says:

> "The existence of this court is, therefore, as essential to the organization of the government, established by the Constitution, as the election of a president or members of Congress. It is the tribunal which is ultimately to decide all judicial questions confided to the Government of the United States. *No appeal is given from its decisions, nor any power given to the legislative or executive departments to interfere with its judgments or process of execution.*"

It is true that this opinion of the Chief Justice appears as an appendix in the reports of this court, and does not seem ever to have been formally adopted. It has, however, been four times approvingly cited by this court and in one case, (La Abra Mining Company vs. United States 175 U. S. 423,) formally adopted as a rule of decision. Referring to the opinion in the Gordon case, Mr. Justice Harlan says:

"The Chief Justice died before the case was decided and the opinion prepared by him in recess was not formally accepted. But if the court approved his views, as it undoubtedly did, the appeal was dismissed upon the ground that Congress could not authorize or require this court to express an opinion in a case in which its judicial power could not be exercised, and where its judgment could not be final and conclusive upon the rights of the parties."

In U. S. vs. O'Grady, 89 U. S. 641, Mr. Justice Clifford says:

"Judicial jurisdiction implies the power to hear and determine a cause, and, in as much as the Constitution does not contemplate that there shall be more than one Supreme Court, *it is quite clear that Congress cannot subject the judgments of the Supreme Court to the reexamination and revision of any other tribunal, or any other department of the government.*"

If it were once admitted that Congress can submit the judgments of the Supreme Court to review or to reexamination by boards or commissions, or special courts created by Congress, it becomes apparent that the independence of the judiciary is lost, and the decisions of the Supreme Court made subject to the will of Congress. Assuming, therefore, that we are correct in our contention, that the judgments of the Supreme

Court are not subject to review by inferior tribunals, let us examine the authority of Congress to authorize the Citizenship Court to vacate the decrees of the United States Courts for the Indian Territory, which had been affirmed by the Supreme Court.

The defendant, Hill, had procured a decree in the territorial court declaring him to be a member of the Choctaw tribe of Indians. This decree was, by the Supreme Court of the United States, affirmed. In the Stephens case (*supra*) it was contended by the Indian tribes that no appeal could be allowed from the Dawes Commission to the United States Courts of the Indian Territory. It was contended that appeals to the United States Courts could only be allowed from *judicial* tribunals—that the Dawes Commission was not a judicial tribunal, and that therefore no appeal could be allowed from that body to the courts. Chief Justice Fuller, who rendered the opinion, answers this contention as follows:

> "As to the first of these objections, conceding the constitutionality of the legislation otherwise, we need spend no time upon it, as it is firmly established that Congress may provide for the review of the action of commissions and boards created by it, exercising only *quasi* judicial powers, by the transfer of their proceedings and decisions, denominated appeals

> for want of a better term, to judicial tribunals for examination and determination *de novo;* and, as will be presently seen, could certainly do so in respect of the action of tribal authorities."

The court recognized the correctness of the contention that an appeal can not be allowed from a *Commission* to a *Court*. The word "appeal," however, was used for want of a better term. There was, strictly speaking, no appeal from the Dawes Commission, but the matter was simply transferred from the Commission to the courts, where the cases must necessarily be tried *de novo*. In other words, the courts *could not* try the cases *as appellate courts*, but *must* try them *de novo*. The Dawes Commission had exercised *quasi* judicial powers. The court, however, was the first judicial tribunal in which the cases could be tried.

Was not the second contention made by the Tribes, viz: That both tribes were necersary parties to the suits in the United States courts, decided adversely to their claims. There is no contention that the act of June 10, 1896, did, in express terms, require both tribes to be parties to the litigation. The Citizenship Court, in its famous opinion in the Riddle case, did not contend that the *act* required notice to both tribes.

That court held that, in as much as both tribes owned the Indian lands in common, and in as much as membership in one tribe carried with it the right to landed interests in both tribes, therefore *both* were necessarily interested in knowing who were the members of the respective tribes—that, since the act of 1896, provided that the Dawes Commission might hear applications for enrollment without notice to both tribes, it provided for establishing a status that carried with it property rights in both tribes, without joint notice, and was therefore unconstitutional.

That court filed a very elaborate opinion, which contained the grounds upon which it based its decree that sought to vacate the decrees of the United States courts, admitting parties to citizenship.

We are somewhat perplexed to know just how to bring this opinion to the attention of this court. No provision was made for its publication. The life of the court has long since expired by operation of law, and under the act that created it there is no legal custodian of its records. Its members, however, in their return to the rule to show cause in *Ex Parte* Joines, 191 U. S. 93, filed a copy of that opinion as a part of their return.

It may be found, therefore, among the records of this court.

For many reasons that will readily suggest themselves, upon its reading, it is a most interesting document, and we beg to commend it to the attention of this court.

While the Judge who rendered this opinion disclaimed any intention to overrule the opinion of the Supreme Court in the Stephens case, his whole argument is based upon the idea that the act of 1896, in failing to provide for notice to both tribes, was unconstitutional. Stripped of all embellishment, the opinion simply held that the act of June 10, 1896, was unconstitutional; notwithstanding the Supreme Court, in express terms, and in a most elaborate opinion, held it *was* constitutional.

The language of this court in the Stephens case is as follows:

> "We repeat, that in view of the paramount authority of Congress over the Indian Tribes, and of the duties imposed on the government by their condition of dependency, we can not say that Congress could not empower the Dawes Commission to determine, *in the manner provided,* who was entitled to citizenship in each of the Tribes, and make out a correct roll of membership in the manner provided for in the act of June 10, 1896. * * * *"
>
> "We hold the entire act constitutional."

Beyond question, that act did not contemplate that both Tribes should be parties to the litigation, because when it comes to provide for the appeal, or rather the transfer from the Dawes Commission to the United States court, it is said that:

> "If the Tribe, or any person, be aggrieved with a decision of the tribal authorities, or the Commission, provided for in this act, *it* or *he* may appeal from such decision to the United States District Court."

It does not say "they" may appeal, a word that would have been used had the act contemplated notice to both tribes, but that "it," that is the tribe in which membership was sought, might appeal.

In the Stephens case the only question determined was the constitutionality of the act of June 10, 1896. The tribes insisted that the act was unconstitutional. Those holding judgments, among whom was the defendant Hill, contended that the act *was* constitutional. The Supreme Court held that the act was constitutional, and in so doing necessarily foreclosed forever all objections that could be raised against its constitutionality. While the *de novo* question was urged in that case, we concede that the question of notice to both tribes was not presented in briefs of counsel then representing the tribes. Attorneys

distinguished for their learning filed elaborate briefs, attacking the constitutionality of the act of 1896, but overlooked presenting the argument, that the citizenship court afterwards held was fatal to the constitutionality of that law.

However, the fact that the argument was not presented does not, in the least, affect the principle that, so far as the law is concerned, that question is forever set at rest.

In that controversy the tribes were bound to bring forward every argument that could be urged against the constitutionality of the act of 1896. In this connection we call the court's attention to U. S. vs. C. & O. Land Company, 192 U. S. 355. In this case patents were issued to the Oregon Central Railway, under the act of Congress, July 2, 1864. This act granted certain land to the state of Oregon to aid in the construction of roads. In March, 1899, Congress, upon request of the Oregon legislature, passed an act authorizing the United States to bring suit in the circuit court for the purpose of declaring the lands forfeited. Suit was brought under the terms of that act, and decided against the United States. A subsequent suit was brought to declare the lands forfeited but different grounds of forfeiture were set up. It was

held that the first suit was *res judicata*. Mr. Justice Holmes says:

> "It may be the law of Scotland that judgment is not a bar to a second suit to reach the same result, by a different *medium concludendi*. But the whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time. He can not even split up his claim; and a *fortiori* he can not divide the grounds of recovery. * * * * It can not be supposed that the United States was not at liberty to raise the issues which defendants and intervenors were given the right to raise. * * * * If the United States were at liberty to state its own grounds for claiming the land, it was bound to do so on the same principles and rules of jurisprudence as other suits in equity are tried therein."

In the case of Werlein vs. New Orleans (187 U. S. 390) the same doctrine is announced. The facts in that case were substantially as follows:

One John Clein brought suit against the city of New Orleans, and recovered judgment for $89,000. Execution was levied upon a tract of land belonging to the city. Before the sale of the property, the city filed suit in equity to enjoin the sale, upon three distinct grounds therein alleged. Tem-

porary injunction was issued, and upon final hearing this was dissolved and the property sold. Thereafter the city brought a second suit against the vendee of the purchaser at the execution sale. In this suit the city relied upon a different ground of recovery from that set up in the injunction suit. In the second suit it was contended that the property had been dedicated to the city for public uses, and it was not subject to execution. The defendant relied on the first suit as *res judicata*, and offered in evidence a copy of the decree in that case. This was excluded by the trial court, upon the ground that, as the city in the second suit relied upon grounds not urged in the first suit, the doctrine of *res judicata* did not apply. Justice Peckham delivered the opinion of the court, and stated that, if the city in the first suit had relied upon the contentions urged in the second suit, it must have been successful. The court held, however, that the city was compelled in the first suit to set forth every ground of recovery it had.

A further decision of the Supreme Court, Davis vs. Brown, 94 U. S. 428, announced the doctrine :

> " A judgment is not only conclusive as to what was actually determined respecting such demand, but as to each matter which might have been brought forward and determined respecting it."

The case of U. S. vs. Throckmortin, 98 U. S. 61, is in point. A bill was filed by the United States wherein it sought to set aside a decree, theretofore rendered by the District Court of the United States, confirming a grant which had been made, by the Board of Commissioners of private land claims in California, to one Richardson. The grounds relied upon in the second suit were, that the findings of the Board of Commissioners, as well as the decree of the District Court, had been procured by fraud. A demurrer was sustained to the second bill upon the ground that the charge of fraud could have been investigated in the prior suit, and was therefore *res judicata.* Mr. Justice Miller says :

> " There are no maxims of the law more firmly established, or of more value in the administration of justice, than the two which are designed to prevent repeated litigation between the same parties in regard to the same subject of controversy, namely, ***interest rei publicae ut sit finis litium,*** and ***nemo debet bis vexori pro una et edam causa.***"
> ¶ " If the court has been mistaken in the law there is a remedy by writ of error. If the jury has been

mistaken in the facts the remedy is by motion for new trial. If there has been evidence discovered since the trial, a motion for a new trial will give appropriate relief. But all these are parts of the *same* proceeding, relief is given in the *same* suit, and the party is not vexed by another suit for the same matter. So, in a suit in chancery, on proper showing, a rehearing is granted. If the inquiry complained of is an erroneous decision, an appeal to a higher court gives opportunity to correct the error. If new evidence is discovered after the decree has become final, a bill of review on that ground may be filed within the rules prescribed by law on that subject. Here, again, these proceedings are all part of the *same* suit, and the rule framed for the repose of society is not violated. * * * *

"In all these cases, and many others which have been examined, relief has been granted on the ground that by some fraud, practiced directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all of his case to the court. * * * * * * * * * *

"To overrule the demurrer to this bill would be to retry, twenty years after the decision of that tribunal, the very matter which they tried, on the grounds of fraud in the document on which the decree was made. If we can do this now, some other court may be called on twenty years hence to retry the same matter on another allegation of fraudulent

combination in this suit, to defeat the ends of justice. And so the number of suits would be without limit and the litigation endless, about the question of the validity of this document."

Just so with the question before this court. The Supreme Court of the United States in the Stephens case decided that the act of June 10, 1896, was constitutional. They decided also that the cases should have been tried *de novo* in the territorial courts. If, after the lapse of four years, Congress had the right to create an inferior tribunal, and authorize it to retry these same questions, there is no reason why it may not, at the end of another four years, establish another tribunal to undo the work of the citizenship court, and the litigation might be extended *ad infinitum.*

It would be difficult to find a case illustrating more forcibly the importance of the doctrines of *res adjudicata* than the one at bar. In this connection we wish to direct the court's attention to the case of Dukes vs. Goodall, 82 S. W. Rep. 702. After the decision of this court in the Stephens case (*supra*) G. W. Dukes, governor of the Choctaw Nation, and twenty-five other Choctaw citizens, together with D. H. Johnson, governor of the Chickasaw Nation, and twenty-five other Chick-

asaw citizens, filed a complaint in equity in the United States court for the Southern District of the Indian Territory, against William Goodall and ten others, as representatives "Of all persons claiming to be members of the Chocktaw or Chickasaw Nations or Tribes of Indians, by virtue of alleged decrees of the United States courts for the Central and the Southern Districts of the Indian Territory, sitting respectively at South McAlester and Ardmore, and commonly known as 'court citizens.'"

The bill was dismissed; the case was taken to the court of appeals for the Indian Territory, and was there pending at the time of the decision of this court in the case of *Ex Parte* Joines (*supra*).

It was there asserted that all such judgments were void, "the process had therein was contrary to the due course of legal procedure in force in the Indian Territory, and contrary to all those rules and principles which have been established by the judiciary of the United States of America for the protection and enforcement of private rights." It was also contended that, as the lands of the two tribes were held by individual members as tenants in common, they should all have been parties to such proceedings, and that, in as much as the act of June 10, 1896,

did not provide for such notice, it was unconstitutional. In speaking of this contention, the court, through Justice Clayton, says: "Passing the question as to whether there is a misjoinder of parties defendant, we will first consider the constitutional questions. It is, that the act of Congress under which the United States courts proceeded in the trial of the cases, did not provide for notice in these cases to the plaintiffs in this case, and therefore the decrees were found without due process of law, as provided by the constitution. Upon this point it is sufficient to say that in the case of Stephens vs. The Cherokee Nation, 174 U. S. 445, the supreme court of the United States, in passing upon *all the constitutional phases* of that act says: 'We hold the entire act to be constitutional.' * * * * Under the provisions of that act they were to be tried *de novo*, which procedure the supreme court in the same case has *clearly and unmistakably held to be proper and correct*."

In Cooley's Constitutional Limitations, seventh edition, pages 79 to 81, it is stated:

> "A decision once made in a particular controversy, by the highest court empowered to pass upon it, is conclusive upon the parties to the litigation and

their privies, and they are not allowed afterward to revive the controversy in a new proceeding for the purpose of raising the same or any other questions. The matter in dispute has become *res judicata*, a thing definitely settled by judicial decision; and the judgment of the court imports absolute verity. Whatever the question involved—whether the interpretation of a private contract, the legality of an individual act, or the *validity of a legislative enactment*—the rule of finality is the same. The controversy has been adjudged; and once finally passed upon, it is never to be renewed. It must frequently happen, therefore, that a question of constitutional law will be decided in a private litigation, and the parties to the controversy, and all others subsequently acquiring rights under them in the subject matter of the suit, will thereby become absolutely and forever precluded from renewing the question in respect to the matter then involved. The rule of conclusiveness to this extent is one of the most inflexible principles of the law; in so much that even if it were subsequently held by the courts, that the decision in the particular case was erroneous, such holding would not authorize the reopening of the controversy in order that the final conclusion might be applied thereto."

The doctrine is nowhere more clearly stated than in Black on Judgments, Vol. 2, Sec. 500;

" That the solemn and deliberate sentence of the law, pronounced by its appointed organs, upon a disputed fact or state of facts, should be regarded as a final and conclusive determination of the question litigated, and should forever set the controversy at rest, is a rule common to all civilized systems of jurisprudence. But it is more than a mere rule of law. It is more even than an important principle of public policy. *It is not too much to say that this maxim is a fundamental concept in the organization of every jural society.* For, unless every judgment should at some point become final, and have the quality of establishing its contents as irrefragable truth, litigation would become interminable, the rights of parties would be involved in endless confusion, the courts, stripped of their most efficient powers, would become little more than advisory bodies, and thus the most important function of government—that of ascertaining and enforcing rights—would go unfulfilled."

The same author, in Sec. 503, says :

" It would be idle, however, to adduce authorities in support of a proposition so familiar, and we are content merely to quote from one or two opinions in which its reasons or importance have been especially well stated. In a leading case in Massachusetts, Chief Justice Shaw observed: 'It is a principle lying at the foundation of all well conducted jurisprudence, that when a right or fact has been

judicially tried and determined by a court of competent jurisdiction, the judgment thereon, so long as it is unreversed, shall be conclusive upon the parties and those in privaty with them in law or estate. The ground of such principle, we think, when rightly understood, is that it presents evidence of a fact of so high a nature, that nothing which could be proved by evidence, *aliunde*, would be sufficient to overcome it; and, therefore, it would be useless for a party, against whom it can be properly applied, to adduce any such evidence, and accordingly he is estopped or precluded by law from doing so. Such is the character of an estoppel by record, as in case of an issue on a question of fact judicially tried and decided.' Still more emphatic is the testimony of the Federal Supreme Court to the inviolability of this principle. In the case selected for citation, the remarks of the learned Judge were specifically directed to the legal system of Louisiana, but his observations will apply with equal truth to any of the United States. He said: 'Under the system of that state, the maintenance of public order, the repose of society and the quiet of families require that what has been definitely determined by competent tribunals shall be accepted as irrefragable legal truth. So deeply is this principle implanted in her jurisprudence, that commentators on it have said that *res judicata* renders white that which is black and straight that which is crooked. No other evidence can afford strength to the presumption of

the truth it creates, and no arguments can detract from its legal efficacy.'"

The case of McCullough vs. Commonwealth of Virginia, 172 U. S. 102, is valuable as illustrating the immunity of judgments and decrees from legislative attack. Under the act of March 30, 1871, a large portion of the public debt of Virginia was refunded, the act providing that the coupons of the new bonds should be receivable for all taxes, debts and dues owing the state. The act of March 7, 1872, in effect, prohibited public officers from receiving these coupons in payment of public dues. The Supreme Court of that state having decided that mandamus was a proper remedy to compel the acceptance of such coupons by the collecting officers, on January 14, 1882, the legislature again took a turn at the matter, by enacting that any taxpayer seeking to use coupons in payment of taxes, should, first, pay the taxes in money, and thereafter bring a suit to establish the genuineness of the coupons, which, if decided in his favor, would enable him to obtain from the treasurer a return of the money paid. On April 18, 1882, the courts were deprived of jurisdiction to issue mandamus to compel public officers to receive such coupons, and finally, in 1894, the legislature repealed the act which authorized

the bringing of suits to establish the genuineness of the coupons. In the meantime, however, before the passage of this repealing act, the plaintiff had brought suit in the Circuit Court of the city of Norfolk and obtained a judgment, establishing the genuineness of certain coupons tendered in payment of taxes. On March 23, 1894, the Supreme Court of Appeals of that state reversed this judgment. It thus became important to determine what rights were granted the plaintiff by virtue of the decree of the Circuit Court establishing the genuineness of his coupons. This court held that the judgment carried with it vested rights, that could not be disturbed by subsequent legislation. This is the language used:

> "But there are more substantial reasons than this for not entertaining this motion. At the time the judgment was rendered in the Circuit Court of the city of Norfolk, the act of 1882 was in force, and the judgment was rightfully entered under the authority of that act. The writ of error to the Court of Appeals of the state brought the validity of that judgment into review, and the question presented to that court was, whether at the time it was rendered it was rightful or not. *If rightful, the plaintiff therein had a vested right which no state legislation could disturb. It is not within the power of a legislature to take away*

rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment, the power of the legislature to disturb the rights created thereby ceases. So, properly, the Court of Appeals in considering the question of the validity of this judgment, took no notice of the subsequent repeal of the act under which the judgment was obtained, and the inquiry in this court is not what effect the repealing act of 1894 had upon proceedings initiated thereafter, or pending at that time, but whether such a repeal divested a plaintiff in a judgment of the rights acquired by that judgment. And in that respect we have no doubt that the rights acquired by the judgment under the act of 1882 were not disturbed by a subsequent repeal of the statute."

Compare this case with the one at bar, and the applicability of the opinion becomes at once manifest. The decree which was declared to be impervious to legislative attack, was not a judgment for money or one establishing title. It simply established the status of certain coupons. Incidental to this decree was the right to use these coupons in the payment of public dues. While this right was an intangible one, it was none the less valuable, and it was *this* that protected the decree against subsequent legislation.

As a necessary incident to the decree establishing Hill's citizenship in the Choctaw Nation, was the right to enjoy all the privileges and immunities of other members of the Tribes. This was a most valuable privilege, and one that we submit could not be destroyed by subsequent legislation. It is an error to suppose that the right to allot lands was the only valuable privilege that attached to Choctaw citizenship.

This court, perhaps, takes judicial knowledge of the fact that, at the time of the rendition of this decree, there were no public schools in the Indian Territory at which non-citizens in the Indian Tribes could educate their children. The Chocktaw and Chickasaw Nations, at the public expense, maintained schools at which all the members of these Tribes might be educated, both board and tuition being furnished at the expense of the government. The moment that Hill was admitted to citizenship by the decree of the United States Court he became entitled necessarily to the right to have his children enjoy these advantages.

He had the right, likewise, to reduce to his possession the land in controversy, and enjoy the rents and revenues arising therefrom.

At the date of the passage of the Curtiss act he was in possession of this land, and had in the meantime placed $1000 worth of improvements thereon, acting upon the integrity of the decree admitting him to citizenship; and by the express terms of this act he had the right to select this particular tract of land as his allotment. This selection he made. For more than four years he claimed and used the property as his own. The right to do this, while an incidental one, was based wholly upon the integrity of the decree admitting him to citizenship. We submit that this was as valuable a property right as was the right of McCullough to use his Virginia coupons in the payment of public dues. We submit, also, that it was a right so valuable that Congress could not destroy it, without compensation.

These authorities are sufficient to establish the proposition, that the question which the Citizenship Court made the basis of its decree, in attempting to vacate the decree of the Territorial Courts, had already been forever set at rest by the opinion of the Supreme Court in the Stephens case. It is indeed amazing that it should have been contended that Congress had the right to submit these questions to the determination of the Citizenship Court.

It should be observed that the Riddle case did not reach the Citizenship Court by the ordinary methods of appeal.

The author of sections thirty-one, thirty-two and thirty-three of the act of July 1, 1902, evidently contemplated that the two questions that section thirty-one sought to submit to the determination of the Citizenship Court would be determined to be without merit. This is evident from the power conferred in section thirty-two. It is there made an *appellate court*, and the character of power sought to be conferred upon it is of an entirely different nature from that sought to be conferred in section thirty-one.

> "The power to *vacate* judgments is an entirely different matter from the power to *reverse* judgments. It is a power inherent in, and to be exercised by, the court which renders a judgment, and to *that* court, and *no other*, applications to set aside judgments should be made." (Black on Judgments, volume 1, section 207.)

It may be safely asserted that no court has the right to set aside a decree other than the court rendering it, unless the decree be procured by fraud, or there be some other intervening agency sufficient to make it unconscionable to permit it to stand. If the irregularities, insisted upon by

the Citizenship Court have merit in them, they can yet be brought to the attention of the courts that rendered the decrees, and if they are fundamental in their character, these courts still have jurisdiction and power to correct them. Congress has not the power, however, to create an administrative tribunal, call it a court, and invest it with power to set aside the decrees of the regularly constituted courts. It is impossible to find authorities exactly applicable to the conditions, for the reason that no such tribunal as the Citizenship Court ever existed before.

Prior to the act of June 10, 1896, the question of membership in the Five Civilized Tribes had been left to the determination of the respective tribal authorities. By that act, however, the United States "Assumed full control over the Five Civilized Tribes, and took upon itself the determination of membership therein," by virtue of the plenary power that Congress exercised over the tribes. There is no doubt, indeed, it is expressly held in the opinion of the Circuit Court of Appeals in this case, that Congress might itself, by direct enactment, have determined the question of membership in each tribe. It being manifestly impracticable for Congress to undertake, itself,

to discharge this duty, it was remitted to the determination of the Dawes Commission, and the United States Courts in the Indian Territory. The act did not undertake to prescribe any mode of procedure that should govern the Dawes Commission in the determination of questions of citizenship. This matter was left entirely to the discretion of the Commission. The act clothed the Commission with power and authority—

> "To administer oaths, to issue process for and compel the attendance of witnesses, and to send for persons and papers * * * * and to use every fair and reasonable means within their reach, for the purpose of determining the rights of persons claiming citizenship, or to protect any of said Nations from fraud or wrong, * * * * and the rolls so prepared by them shall be hereafter held and considered to be the true and correct rolls of persons entitled to rights of citizenship in said several Tribes: Provided, that if the Tribe or any person be aggrieved with the decision of the tribal authorities, or the Commission provided for in this act, it or he may appeal from such decision to the United States District Court."

It is beyond question that, under this act, the Dawes Commission had the power to prescribe the rules that should govern it in determining applications for citizen-

ship, and to provide the kind of notice, and the manner of service upon the Tribe in which membership was claimed. That the Dawes Commission was acting within the authority expressly granted by this act, when it provided that notice should be given to the Governor of the Tribe in which membership was sought, can not be questioned. If, therefore, it was indispensable, as held by the Citizenship Court, that notice of the proceedings had in the United States Court should have been had upon both the Choctaw and Chickasaw Tribes, this resulted, not because of anything contained in the act of Congress, but because membership in either Tribe carried with it property rights, and in as much as both tribes held the property in trust for their respective members, it was essential under the Constitution that both tribes should have notice of such proceedings. This is exactly what the Citizenship Court held. Not that the act required notice to both Tribes, but that both Tribes were, under the Constitution, entitled to notice, and therefore that the act, in failing to provide for notice, was unconstitutional. This, too, in the face of the opinion in the Stephens case, holding the act constitutional.

In the case of Cherokee Nation vs. Hitchcock, 187

U. S. 294, this court, in speaking of the act of June 28, 1898, says:

> "The decision in Stephens vs. Cherokee Nation, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722, is particularly in point, as that case involved the validity of the very act under consideration, and the ***precedent correlative legislation,*** wherein the United States practically assumed the full control over the Cherokees, as well as the other Nations, constituting the Five Civilized Tribes, and took upon itself the determination of membership in the tribes for the purpose of adjusting their rights in the tribal property. The plenary power of control by Congress over the Indian tribes and its undoubted power to legislate, as it had done through the act of 1898, directly for the protection of the tribal property, was, in that case, reaffirmed."

The constitutionality of this act was again attacked in the case of Morris vs. Hitchcock, 194 U. S. 384, where the court says:

> "The question of the validity and construction of that act was under consideration in Stephens vs Cherokee Nation, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722, and Cherokee Nation vs. Hitchcock, 187 U. S. 294, 47 L. ed. 183. 23 Sup. Ct. Rep. 115, and in view of the rulings in those cases the constitutionality of the statute is not now open to question."

The net result of the unwise and unfortunate act of July 1, 1902, is, that the decisions of this court upholding the constitutionality of the act of June 10, 1896, have been overruled and set at naught by the Citizenship Court, and many hundreds of Choctaw and Chickasaw Indians deprived of their earnings, that were invested upon the integrity of the decrees of this court.

The necessary and inevitable effect of the decree of the Citizenship Court in the Riddle case was to declare the act of June 10, 1896, unconstitutional, and thus reverse the decision of this court in the Stephens case. In as much as that act did not require notice to both Tribes, it would have been a useless proceeding had the courts in the Indian Territory given such notice, after the cases were transferred from the Dawes Commission. If notice is essential in any case, it must be either for constitutional reasons or else because the statute requires it. If a statute is defective, in failing to require notice, it is well settled that it can not be made valid by any act of the court in actually giving notice.

> "It is not enough that the owners may, by chance, have notice, or that they may, as a matter of favor, have a hearing. The law must require notice to them and give them the right to a hearing

> and an opportunity to be heard. It matters not upon the question of the constitutionality of such a law, that the assessment of its facts be fairly apportioned. The constitutional validity of law is to be tested, *not by what has been done under it, but by what may, under its provisions, be done.*" (Stuart v. Palmer, 74 N. Y. 183.)

The Choctaw and Chickasaw Nations were charged with notice of the provisions of the act authorizing the determination of questions of citizenship by the United States Courts; therefore, if the courts had actually served notice of such proceedings upon both Tribes, it would have been an act of supererrogation, since the law did not require such notice, and the Indian Tribes were charged with knowledge of the provisions of the statute. (Reetz vs. Michigan, 188 U. S. 505, Rees, vs. Watertown, 19 Wall 107.)

It results, therefore, that since the act did not require notice to both tribes, and since the courts were without authority to give such notice, *if* the Citizenship Court was right in holding that in such proceedings notice to both tribes was indispensable, it must necessarily be because the act was unconstitutional in failing to provide such notice, and therefore that this court was in error,

when it held, in the three cases heretofore referred to, that the act was unconstitutional.

FOURTH.

The act providing for the creation of the Citizenship Court was class legislation, and therefore unconstitutional. The act of 1890 put the Constitution in force in the Indian Territory, and, since that time, the various members of the Indian tribes have been as much entitled to its protection as citizens of the United States.

The act of June 10, 1896, applied alike to all the Five Civilized Tribes. The same laws of Congress, the same rules of the Dawes Commission, and the same proceedings in the United States Courts that governed in application for citizenship in the Chickasaw and Choctaw Tribes applied likewise to the application for citizenship in the Creek, Cherokee and Seminole Nations. In those three Tribes, appeals taken to the United States Courts were tried *de novo*, just as they were in cases affecting Choctaw and Chickasaw citizenship.

The act of July 1, 1902, which established the Citizenship Court, did not, in any way, undertake to affect the decrees that had been rendered by the courts of the

United States admitting parties to citizenship in the Creek, Cherokee and Seminole Tribes. Why citizens in the Chickasaw and Choctaw Nations, who had literally complied with the act of Congress, as well as with the rules of the Dawes Commission, and who had procured decrees declaring them to be members of those Tribes, should be singled out and subjected to burdens that were not imposed upon applicants for citizenship in the other three Tribes, is past finding out. It is class legislation, and ought not to receive the sanction of the courts.

> "A statute would not be constitutional which should prescribe a class or party for opinion's sake, or which should select particular individuals from a class or locality, and subject them to peculiar rules, or impose upon them special obligations or burdens, from which others in the same locality, or class, are exempt." (Cooley's Constitutional Limitation, seventh edition, page 556.)

The same author, on page 560, says:

> "Special courts can not be created for the trial of the rights and obligations of particular persons; and those cases of legislative acts granting new trials, or other special relief in judicial proceedings, while they have been regarded as usurpations of judicial authority, have also been considered obnoxious to the objection that they undertook to suspend

general laws in special cases. The doubt might also arise whether a regulation made for any one class of citizens, entirely arbitrary in its character, and restricting their rights, privileges or legal capacities, in a manner unknown before to the law, could be sustained, notwithstanding its generality."

FIFTH.

The defendant Hill, in his application for citizenship, complied literally with the rules adopted by the United States government and its agents, and that government, as well as the Choctaw and Chickasaw Tribes, is estopped to claim that the proceedings admitting him to citizenship were irregular. The act of June 28, 1898, provided:

> "That all the lands within the Indian Territory belonging to the Choctaw and Chickasaw Tribes shall be allotted to the members of said Tribes, so as to give to each member, so far as possible, a fair and equal share thereof."

This act was ratified by the Choctaw and Chickasaw Nations. More than a year prior to this, the decree of the United States had declared that Hill was a member of the Choctaw Tribe of Indians. At the time the Choctaw and Chickasaw Nations agreed to this act, it was known that Hill had been pronounced by the decree of the court to be a member of the Tribe. It is beyond dispute that this act contemplated an allotment of lands to Hill, as

much so as if he had been personally named in the law. The Tribes, and the United States government, having agreed by this act that the lands might be allotted to him, and he, having acted upon the good faith of these governments, and having expended large sums of money in the improvement of the lands he had selected as his allotment, the Choctaw and Chickasaw Nations were estopped to assert that Hill was not a member of the Choctaw Tribe. The grounds of an estoppel against a state may be drawn either from the acts or omissions of its public officers, or from the action of its legislature, and, likewise, against these tribes, by the action of their commissioners, in making the treaty above referred to. Good faith should characterize the conduct of these tribes in their dealings with their members, and the law will not exempt them from the doctrine of estoppel; like a private person, they may be estopped by their acts, silence, consent or acquiescence.

See People vs. Stephens, 71 N. Y. 527.
Lindsay vs. Haws, 2 Black, U. S. 554.
State vs. Milk, 11 Fed. 389.
State vs. Flint, 89 Mich. 481.
Sanders vs. Hart, 57 Tex. p. 8,
State vs. Dint, 18 Mo. 313.
Alexander vs. State, 56 Ga. 478; and 49 Mo. 216.

SIXTH.

The learned Judge who delivered the opinion of the Circuit Court of Appeals, in summing up the conclusions of that court, uses the following language:

> "The power conferred upon the Dawes Commission and the United States Courts in the Indian Territory by the act of June 10, 1896, and upon the Supreme Court by the act of July 1, 1898, to determine who were citizens of the Choctaw and Chickasaw Nations was *legislative* and not *judicial*, and all judgments and proceedings thereunder were subject to any subsequent legislation of the United States respecting the question of citizenship, which was enacted before allotments of land were made to the successful litigants under the previous legislation."

Is this a correct statement of the law? Is it true that when this court, in the case of Stephens vs. Cherokee Nation (*supra*) upheld the constitutionality of these acts it was not exercising judicial power? The only question which this court was called upon to determine was the constitutionality of the various acts of Congress affecting the Five Civilized Tribes. Can it be that this court was exercising *legislative* and not *judicial* power?

That its decrees were of no more effect than if they had been rendered by an "Indian Agent, a Commission or a Committee?"

The case of United States vs. Coe (155 U. S. 76) is exactly in point. The act of March 3, 1891, provided for the establishment of "a court of private land claims to hear and determine the pleas of all persons claiming lands within the limits of the Territory derived by the United States from the Republic of Mexico, and embraced within the Territory of New Mexico, Arizona and Utah, and within the states of Nevada, Colorado or Wyoming by virtue of any Spanish or Mexican grant, by concession or warrant." The act provided that any decree rendered by such court "should not affect the private rights of persons as between each other, but that its decrees and acts should be conclusive of all rights as between the United States and all persons claiming any interest or right in such land." It also provided that either the United States or the claimant might appeal to the Supreme Court. The court, organized under the provisions of this act, rendered a decree confirming a Mexican grant in favor of Coe. The United States appealed, and, in this court, motion was made to dismiss, one of the grounds assigned being

"That the Congress had no power to confer upon this court jurisdiction to entertain an appeal from the decree of the court of private land claims, because the latter is not vested with judicial power, in virtue of any provision of the Constitution." The argument was that since the judges held their offices for a limited time, the court was not one of those mentioned in the third article of the Constitution, and was therefore incapable of receiving judicial power. The Chief Justice, in rendering the opinion of this court, stated:

> "It must be regarded as settled that section one of article three does not exhaust the power of Congress to establish courts."

The motion to dismiss was accordingly denied. The methods adopted by Congress in establishing the court of private land claims and vesting it with jurisdiction, and in establishing United States courts in the Indian Territory, and vesting them with jurisdiction to determine matters of citizenship, and in providing, in both cases, for appeals to this court, are strikingly similar. In each case the court was a creature of Congress. In each case the matters submitted to it for determination were questions over which Congress had plenary power, and which it might have determined by direct enactment, without the

intervention of any other agency. In both cases appeals were allowed to this court.

It was distinctly held in the Goe case, that the court of private land claims, as well as this court on appeal, was exercising judicial power, and that Congress derived its power to create such court and vest it with judicial power from the Constitution. So far as the principle under discussion is involved, it is impossible to differentiate the two cases.

We concede that the question of citizenship in the Indian tribes was one over which Congress had plenary power; that by virtue of its sovereignty and its power to make all needful rules and regulations respecting the territories belonging to the United States, Congress was omnipotent in the Indian Territory; that it was under no obligation to establish in that territory courts of any character; that its power therein was absolute—despotic—and that it possessed the summary disposal of both life and property therein.

The fact remains, however, that Congress *has* established courts there; that it has vested them with jurisdiction to determine this very question of citizenship; and that it *has* required this court, on appeal, to determine

the constitutionality of the acts conferring this jurisdiction. Of what avail was it to put the Constitution in force in that country? Of what avail was it to establish courts and vest them with all the jurisdiction of United States Circuit and District Courts, including the right to determine questions of citizenship? Of what avail was it to impose upon this court the burden of determining the constitutionality of this legislation, if Congress, after the final action of all the courts, was to strike down their most solemn decrees, and make itself the final judge of all questions thus litigated?

The Constitutiou intended that the Judiciary should be independent of Congress, and it would be a dangerous innovation if this court should hold that its final judgments and decrees are subject to the legislative will, in all cases appealed from what are called legislative courts, or where the controversy is about matters originally cognizable by Congress.

What is the final extent to which the decision of the Circuit Court of Appeals reaches? Did Congress possess the power to vest the Citizenship Court with jurisdiction to nullify the decrees of this court, solely because the question of citizenship was a political ques-

tion; or, did it possess this power because the Indian Territory courts were legislative courts? or did it possess this power for both reasons combined? The decision of the Circuit Court of Appeals is based upon the idea that it is because of the former reason. Since, however, the power of Congress was absolute in the Indian Territory, and the question as to whether it would even establish a court there was a political one; and since Congress might have reserved to itself the right to determine by direct enactment all controversies that have been submitted to those courts, it would seem to result, logically, that if the Circuit Court of Appeals is correct in its statement of the law, Congress has power, itself, to review or to authorize any other agency to review, all the final decrees and judgments of the courts in the Indian Territory. On the other hand, if Congress may reverse or vacate the final decrees of this court which come from Indian Territory courts on all questions over which it had plenary power, but which are capable of judicial action, then it would logically follow that, if these questions had been originally submitted to what are called the constitutional courts, to-wit, the Circuit and District Courts of the United States, Congress could still nullify these judg-

ments and decrees, notwithstanding they had been appealed to, and affirmed by, this court. There are numerous instances of legislation, where Congress has delegated to the District Courts the power to determine questions originally political, but which are of a judicial nature, and if Congress, in all such instances, may set aside the decrees and judgments of these courts, after they have become final, on appeal or writ of error to this court, it will result that the Supreme Court is not as independent of the legislative department of the government as it has always been thought to be, but that a large number of its opinions are vulnerable to the interference of Congress, or of such boards, committees or commissions as Congress may see proper to create. If this new doctrine of congressional power is once accepted, and the Supreme Court once enters this field of new and strange construction, we may regretfully expect that the time is fast hastening when the independence of this court will be completely destroyed.

That Congress may relinquish or surrender its plenary power over political questions, and that this power once surrendered may never be resumed, is intelligently stated n the recent case of *Re* Heff, 197 U. S. 488. In this

case Congress had surrendered its plenary powers of guardianship over the petitioner, which it, by subsequent enactment, sought to resume. The court held this could not be done. This case is, we believe, ample authority for our contention that, when Congress delegated the question of determining citizenship in the Indian tribes to the courts, and the litigation thus authorized had become final by the decree of this court, it could not constitutionally resume its original power and disturb the decrees thus made conclusive. The case of Hitchcock vs. The Cherokee Nation, 187 U. S. 183, is not in conflict with our contentions. There was no effort in that case to disturb the judgments of the courts, nor was there any effort to divest property. Indeed, this court is careful to state :

> "There is no question involved in this case as to the *taking* of property. The authority which it is proposed to exercise by virtue of the act of 1898 has relation to the control and development of the tribal property, which still remains subject to the immediate control of the government, even though the members of the Tribes have been vested with the status of citizenship under recent legislation."

The powers sought to be exercised by the Secretary which gave rise to that case, were purely administrative

and have no relation to the questions we are discussing.

In United States vs. Arredondo, et al (6 Peters, 691) a bill was filed in the Supreme Court of the District of Florida against the United States, to establish title to 289,000 acres of land. The property was claimed by virtue of a Spanish grant made on December 22, 1817. Florida, having been ceded to the United States in 1819, Congress, on the 26th day of May, 1824, provided for the appointment of a board of land commissioners, to determine the rights of land claimants, where the quantity claimed did not amount to more than one square league of land. On the 23d day of May, 1828, Congress passed another act, under the terms of which claimants whose rights had not already been determined, under the previous provisions of law, might file their suits in the Supreme Court of the district wherein the land might lie, for the purpose of determining title. The act provided for an appeal by either party to the Supreme Court. The lower court entered a decree confirming plaintiff's title, and the United States appealed to this court, where the case was affirmed. It is clear that Congress originally had the power to determine this claim, without submitting it to the action of the court. Likewise, it had the power

to refer it to the determination of the land commission, and make its finding final, or require its action to be referred back to Congress for further action. It also had the right to refer the entire question to the determination of the court; and this was the method adopted. It is quite clear that this court proceeded upon the idea that it was exercising judicial power in the determination of the question thus submitted. The court, speaking through Judge Baldwin, says:

> "The power to hear and determine a cause is judicial; it is *coram judice* whenever a case is presented which brings this power into action. * * * The laws under which we now adjudicate on the rights embraced in the treaty and its instructions, authorize and direct us to do it ***judicially***, and give its judicial meaning and interpretation as a contract on the principles of justice and the rules of equity. * * * The only question depending is, whether the claimants or the United States are the owners of the land in question. By consenting to be sued, and submitting the decision to judicial action, they have considered it as a purely judicial question, which we are now bound to decide as between man and man, on the same subject matter and by the rules which Congress themselves have prescribed. * * * The acts of 1824 and 1828 authorize and require us to decide on the pending title on all

> the evidence and laws before us. Congress has disclaimed its decision as a *political* question for the legislative department to decide, and enjoined it on us as one *purely judicial.*"

Other expressions in this opinion indicate clearly that this court regarded itself as exercising judicial functions, and that its decree in the case was final. (See United States vs. Old Settlers, Etc., 148 U. S. 427.)

It is interesting to speculate just what the result might have been, had Congress claimed and exercised the power to disturb this judgment, by the creation of some extraordinary tribunal like the Citizenship Court. The Supreme Court of Florida, in which the suit originated, like the courts in the Indian Territory, was a legislative court. The questions submitted to its determination, like the question of citizenship, submitted to the Indian Territory courts, were questions over which Congress originally had plenary power, and which it might have exercised by direct enactment, without submitting them to the determination of any other tribunal. In both cases appeals were allowed to this court, and in both cases the lower courts were affirmed. The judgment of the Supreme Court in the Arredondo case, being a determination of matters that were originally, exclusively, cognizable by

Congress, was not more binding than were the decrees of this court, affirming the Indian Territory courts, in cases admitting parties to citizenship. Could Congress lawfully have created a tribunal, such as the Citizenship Court, and authorized it to set aside the judgment of this court in the Arredondo case?

In Astiazaran vs. Santa Rita Land and Mining Company, (148 U. S., 80) the court had under consideration a controversy, growing out of a Mexican land grant in the Territory of Arizona. Congress made no provision, as it had done in California, by which parties in Arizona could have their claims to lands decided in any judicial tribunal. The provisions for determining such questions were, that the Surveyor General for the Territory, under the instructions of the Secretary of the Interior, should ascertain the nature and extent of such claims, and report the result of such investigation to Congress for its action. While the surveyor's report was pending before Congress for its consideration, the plaintiff brought his suit in the District Court of the Territory of Arizona, to establish title to the land in controversy. This court held, that the matter was one which Congress could properly determine; that while it was pending before Congress, the courts could not in-

terfere, and that whatever action might be taken by Congress would be conclusive upon the merits of the claim upon all other departments of the government. The court, however, recognized the power of Congress to submit the determination of this question to the judiciary, in this language:

> "But the duty of providing the mode of securing their rights, and of fulfilling the obligations imposed upon the United States by the treaties, belonged to the political department of the government, and Congress might, either itself, discharge that duty, or delegate it to the judicial department."

The oft quoted case of Den vs. the Hoboken Land and Improvement Company, (18 How., 272) is authority for the statement, that questions over which Congress has plenary power may be submitted to the courts of the United States, and thus become subjects of judicial action. The court had under consideration a title based upon a sale made by the Marshal of the United States, under what is known as a distress warrant, issued by the Solicitor of the Treasury, and levied upon property of the Collector of Customs for the port of New York, for a balance found to be due the United States The contention was made that the audit-

ing of accounts was a judicial act, that Congress had no constitutional power to provide, that this might be done by an auditor and property might be sold to satisfy any claim found to be due the United States, without submitting the determination of the question of indebtedness to a court.

Answering this contention, Judge Curtiss says:

> "That the auditing of the accounts of a receiver of public moneys may be, in an enlarged sense, a judicial act must be admitted. So are all those administrative duties, the performance of which involves an inquiry into the existence of facts and the application to them of rules of law. * * * * But it is not sufficient, to bring such matters under the judicial power, that they involve the exercise of judgment upon law and fact. It is necessary to go further and show, not only that the adjustment of balances due from accounting officers may be, but from their nature, must be, controversies to which the United States is a party, within the meaning of the second section of the third article of the constitution. We do not doubt the power of Congress to provide by law that such a question shall form the subject matter of a suit, *in which the judicial power can be exerted.* The Act of 1820 makes such a provision for reviewing the decisions of the accounting officers of the Treasury. But until reviewed, it is final and binding; and the question is whether its subject

matter is necessarily, and without regard to the consent of Congress, a judicial controversy. And we are of opinion it is not."

Again, the court says:

"At the same time there can be no doubt that the mere question, whether a Collector of the Customs is indebted to the United States, *may be one of judicial cognizance.* It is competent for the United States to sue any of its debtors in a court of law. It is equally clear that the United States may consent to be sued, and may yield this consent upon such terms and under such restrictions as it may think just. Though both the marshal and the government are exempt from suit, for anything done by the former in obedience to legal process, still Congress may provide by law, that both, or either, shall, in a particular class of cases, and under such restrictions as they may think proper to impose, come into a court of law or equity, and abide by its determination. The United States may thus place the government upon the same ground which is occupied by private persons who proceed to take extra judicial remedies for their wrongs, and they may do this to such extent, and with such restrictions, as may be thought fit. * * * * * * To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit

> at the common law, or in equity, or admiralty; nor, on the other hand, ***can it bring under the judicial power, a matter which, from its nature, is not a subject for judicial determination.*** At the same time, there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper. Equitable claims to land by the inhabitants of ceded territories form a striking instance of such a class of cases; and as it depends upon the will of Congress whether a remedy in the courts shall be allowed at all, in such cases they may regulate it and prescribe such rules of determination as they may think just and needful."

The case of the United States ex rel. Bernardin *v.* Duell, (172 U. S., 573) is directly in point. In an interference proceeding in the patent office between Bernardin and Northall, the commissioner decided in favor of Bernardin, whereupon Northall appealed to the Court of Appeals for the District of Columbia, which court reversed the finding of the commissioner, and awarded the priority to the appellant. Thereupon Bernardin applied to the commissioner to issue him a patent, notwithstanding the judgment of the Court of Appeals. This request was re-

fused and Bernardin applied for a writ of mandamus, to compel the commissioner to issue him a patent in accordance with his decision, on the ground that the statute providing an appeal from the commissioner to the Court of Appeals was unconstitutional, and the judgment of the Court of Appeals was void for want of jurisdiction. The contention was:

> "That Congress had no power to authorize the Court of Appeals to review the action of the commissioner in an interference case, on the theory that the commissioner is an executive officer; that his action in determining which of two claimants is entitled to a patent is purely executive; and that therefore such action cannot be subject to review of a judicial tribunal."

The former decisions of this court are reviewed, and the conclusion reached, that, while Congress cannot bring under the judicial power a matter which in its nature is not a subject for judicial determination, nevertheless, it may remit to the determination of the courts questions that are essentially judicial in character. Referring to the opinion in Butterworth vs. Hoe, (112 U. S., 50) wherein it was held that the action of the courts in determining such matters was conclusive upon all departments of the government, the court says:

"We perceive no ground for overruling that case or dissenting from the reasoning of the opinion; and, as the proceeding in the Court of Appeals on an appeal in an interference controversy, presents all the features of a civil case, a plaintiff, a defendant, and a judge, and deals with a question judicial in its nature, in respect of which the judgment of the court is final so far as the particular action of the Patent Office is concerned, such judgment is none the less a judgment 'Because its effect may be to aid an administrative or executive body in the performance of duties legally imposed upon it by Congress in execution of a power granted by the constitution.' (Interstate Commerce Commission vs. Brimson, 154 U. S., 447). * * * * * * The nature of the thing to be done being judicial, Congress had power to provide for judicial interference through a special tribunal, (United States vs. Goe, 155 U. S., 76 (39 : 76)); and a *fortiori* existing courts of competent jurisdiction might be availed of."

The question whether Hill possessed Choctaw blood, and was therefore a member of the Choctaw Tribe of Indians was essentially judicial in character, and such as might be remitted to the courts for judicial determination. When Congress provided that it should be determined by the courts, that body "*disclaimed* the right to treat it as a *political* question, and made it one of purely *judicial* action."

The determination of the question of citizenship in the Choctaw and Chickasaw Tribes of Indians, being, originally, a duty incumbent upon Congress, it had the power to discharge that duty in either one of four ways: First, it could determine it by direct enactment. Second, it could delegate the determination of the question to a commission or a board, or other such agency, and make such determination final. Third, it could delegate the matter to such a board or commission, and require it to be submitted back to Congress for its further action. Fourth, it could refer the matter to the determination of the courts.

Having remitted the matter to the courts it had the right to withdraw this jurisdiction at any time before the action of the courts had become final. Indeed, it is possible that Congress could have required the action of the United States Courts in the Indian Territory to be submitted back to Congress, for confirmation or rejection. Congress could not, however, lawfully impose upon this court the duty of determining such questions, and after its action had become final, either itself reverse, modify or vacate, or authorize any other tribunal to reverse, modify or vacate the decree thus obtained. This court does not sit as an Indian Agent, or a commission; it cannot exer-

cise any functions other than those that are judicial. Its judgments and decrees are impervious to all attacks, whether collateral or direct. As a co-ordinate branch of the government, it is equal in dignity with the legislative. It is not the plaything of Congress, nor may that body impose upon it the determination of matters which may properly be made subjects of judicial cognizance, and then submit its final judgments to further review, if they do not accord with what Congress thinks they should have been. Congress imposed upon this court the duty of determining whether or not the Acts of June 10, 1896, and July 1, 1898, were constitutional. Surely, such a question is a judicial one, and one upon which the powers of this court may act.

It is true that this court was not exercising any of the judicial powers conferred by article three of the constitution. It is well settled, however, that this section of the constitution does not exhaust the power of Congress to establish courts. The fact that Congress derives its power to establish courts in the Territories from portions of the constitution, other than article three, does not, in any measure, exempt it from constitutional restraint, and permit it to exercise unbridled power over the final judgments of courts, thus established.

In our judgment, the cases cited by the Circuit Court of Appeals do not sustain the statement of that court that,

> "The legislative department of the government has ample power, by subsequent enactment, *to grant a new trial*, or a review by suitable tribunal, of judgments final, under the laws in force when they were rendered."

We confess that the legislative department has the right to provide for a review by some suitable judicial tribunal, but we do not concede that the legislative department of the government has the right to *grant a new trial.*

A review of the cases cited may not be unprofitable, and we, therefore, refer to them briefly:

(*a*). In the case of Sam Peyreac vs. United States, (7th Peter, 222) suit was filed in the Superior Court of the Territory of Arkansas, sitting in chancery, to establish the title to a tract of land, claimed to have been granted to the plaintiff by the Spanish Governor of the province of Louisiana. It was claimed in the petition that in October, 1789, the plaintiff addressed a letter to the Spanish Governor, asking for a grant of the land in controversy; and that, on the 11th day of October, the Governor made an order of survey, granting the plaintiff the right to locate

the land in question. The Territorial Court entered a decree, establishing the plaintiff's title to the land in question. About two years thereafter, the United States, under the Act of 1840, filed *in the same court*, a bill of review, alleging that the decree had been obtained by fraud. It was charged that the original petition to the Spanish Governor, and the order of survey issued by him were both forgeries. The plaintiff failed to answer, and a decree, *pro confesso*, was entered as against him. Thereupon, one Joseph Stuart, who claimed title to the land through purchase from one John J. Bowie, asked permission to be made a defendant, and such permission being granted, he claimed that he was an innocent purchaser, having purchased from Bowie, in ignorance of the fraud that had been practiced upon the United States in the original decree.

It was admitted in the argument of the case

> "That the grant under which Sam Peyreac claimed the land was a forgery; and that the deed from him to Bowie was a forgery."

We respectfully suggest that this hardly sustains the view of the Circuit Court of Appeals that

> "After the decree had become final, under existing laws, an innocent purchaser bought the established title."

The Supreme Court specifically repudiated the suggestion that Stuart had purchased the established title of Sam Peyreac, and that his right to the property had thereby become vested, before the passage of the Act, authorizing the filing of the bill of review. The court says:

> "It is found by the decree of the court below, and is admitted at the bar, that Sam Peyreac is a fictitious person. That the petition purported to have been presented by him to Mero, Governor of the province of Louisiana, and the order alleged to have been made thereon, are forgeries. These are the only evidences of title upon which the original tract rested, and it is proved and admitted that the deed purporting to have been given by Sam Peyreac to Bowie, under whom Stuart claims, is also a forgery. * * * * * If Sam Peyreac was a real person, and appeared here, setting up these objections, it might present a different question."

The decision is not based upon the ground, that, the legislative department of the government has the right to grant a new trial, but is based upon the double proposition, First; that the deed under which Stuart claimed, being a forgery, he failed to connect himself with Sam Peyreac, and Second, that Sam Peyreac, being a fictitious person, "the original decree in this case was a mere nullity; it gave no right to any one." The bill of review in

the Sam Peyreac case was filed *in the sane court* that rendered the original decree, and was based upon admitted fraud. It was but a continuation of the same proceeding. It was the exercise of a jurisdiction claimed by courts of equity from time immemorial, and was in the due course of orderly judicial procedure. The legislation that authorized this bill of review was far different from the legislation in the present case, which authorized a special tribunal, not capable of exercising judicial functions, to annul the decrees of the Supreme Court.

(*b*). In the case of Freeborn vs. Smith, (2 Wallace, 160) the plaintiff had recovered judgment in the District Court of the Territory of Nevada, which on appeal, was affirmed by the Supreme Court of the Territory. The case was brought to this court on writ of error. While pending here, the Territory of Nevada was admitted to the Union as a State. The act of admission, under the decisions of this court, abolished the Territorial Court in which the judgment was rendered. There being no court in existence to which the mandate of this court could go, its jurisdiction to further hear the writ of error would have abated. While the cause was still pending in this court, Congress, on the 27th day of February, 1865, passed an Act,

which provided that all appeals or writs of error from the Supreme Court of the Territory of Nevada might be proceeded with by this court, and its mandate issued to the Supreme Court of the State of Nevada. It was contended that this Act was unconstitutional, because its effect was to disturb the judgment which had become final before its passage. This court held, that at the very moment the Territory of Nevada became a State, all the Territorial Courts were abolished. That the case in which judgment had been rendered, and which was then pending on writ of error, was suspended, without power upon the part of this court to proceed with the writ of error, or, upon the part of the trial court, to enforce the judgment; and that the parties were left to renew their litigation in the State tribunals. The plaintiff, who had recovered below, being thus deprived of his original judgment, and the defendant of the right to proceed with his writ of error, this court very properly held that Congress had the right to provide a remedy by which the same case might be proceeded with to final determination in the same court in which the writ of error was then pending.

(c). In Garrison vs. New York, (21 Wallace, 196) under an Act of the New York legislature, commis-

sioners were appointed by the Supreme Court to assess the damages sustained by parties, resulting from the straightening of Broadway, in New York City. Among other awards, the damages of Garrison were estimated at $40,000, and this report was confirmed by order of the Supreme Court in December, 1870. Two months after the order of confirmation, the legislature passed an Act, which, besides granting the right of appeal, authorized either the city or other parties interested, to make a motion before the Supreme Court or any Justice of the same, to vacate the order of confirmation, because of fraud or irregularities, etc. Under this act, on proper motion, the Supreme Court vacated its order of confirmation, upon the ground that in the award of damages, there had been

> "Error, mistake, irregularity and illegal acts in the proceedings, and that the assessment for benefit and award for damages had been unfair, unjust, inequitable and oppressive."

Thereafter, the plaintiff brought suit to recover the $40,000 award, claiming that the Act of the legislature, which authorized the Supreme Court to vacate its order of confirmation, was unconstitutional, in that it impaired the obligation of a contract, and that plaintiff's right to the

$40,000 award had become vested, and could not be disturbed.

With reference to the first contention, this court held that the judgment was not a contract within the meaning of the constitutional prohibition. With reference to the contention of plaintiff that his right to the amount of the award had become vested, and therefore the Act of the legislature was unconstitutional, this court held that the decision of the Court of Appeals of the State of New York, holding that the Act infringed no provision of the State constitution, was binding upon it. It is pertinent to state just here that in this case, the proceeding for vacating the order of confirmation was instituted in the same court that entered the order, and was a part of the same suit. Besides, the award for $40,000 was not such an unconditional judgment as to support the plaintiff's claim that his interest therein was a vested right. The plaintiff could not successfully claim that his right to the judgment was vested, until the title to the property in controversy had vested in the city.

The authorities in this country, including the decisions of this court, are almost uniform, to the effect that in condemnation proceedings, title to property does not pass

until the compensation has all been actually paid, or suitable provision for its payment secured. Indeed, the authorities are, that the condemning party, at any time before title has passed to it, may abandon the condemnation proceedings. It is clear, that the City of New York, instead of availing itself of the right to seek, in the Supreme Court, a vacation of its order of confirmation, might have abandoned further proceedings, in which event, the title to the property would have remained in the plaintiff and his inchoate right to the award would thus have been destroyed.

(*d*). In the case of Freeland vs. Williams (131 U. S. 405) Freeland brought suit in the Circuit Court of Preston county, West Virginia, against Williams for the taking and conversion of certain cattle, the property of the plaintiff. He recovered judgment, which was affirmed by the Supreme Court of that state. Subsequently, in 1872, the Constitution of the state was amended so as to provide:

> "No property shall be seized or sold under final process issued upon judgments or decrees heretofore rendered, or otherwise, because of any act issued according to the usages of civilized warfare by either of the parties thereto. The legislature shall provide by general law for giving full force and effect to this section, by due process of law."

The legislature sought to discharge the duties thus imposed upon it, and by the law thus enacted Williams obtained a new trial in the court that rendered the judgment. On appeal from the order granting a new trial, the lower court was reversed and the proceeding to set aside the judgment was dismissed. The Supreme Court held that the method prescribed by the legislature to secure a new trial was not due process of law, and was, therefore, not constitutional. Thereupon Williams sought to enjoin the enforcement of the judgment by bill in equity, filed in the court in which the judgment was rendered. Freeland contended that the Constitution of West Virginia was in conflict with the Constitution of the United States; first, because it impaired the obligation of a contract, and second, because it deprived him of property without due process of law. The first of these contentions was adversely determined, but the reasons assigned are not material to the discussion of this case.

In the disposition of the second contention, this court found itself confronted with a more serious question. The original action was a simple case of trespass for the wrongful seizure and conversion of cattle. In the second action, in which it was sought to restrain the collection

of the judgment, it appeared that the cattle were taken by Williams under an order of Gen. Fitzhugh Lee, and in the exercise of belligerent rights. This court held that the original judgment on its face was *prima facie* valid, but, that, since it appeared from the facts proven on the second trial that it was founded upon an act done in the exercise of belligerent rights, it was voidable, and that the procedure through which it was enjoined was one of the recognized processes of law for re-examining matters on which a judgment is founded, and was, therefore, due process of law.

> "Judgments, however solemn, however high the court which rendered them, and however conclusive in a general way between the parties, may be subject to review, to reconsideration, to reversal, and to modification by various modes. Among these are motions for new trials, appeals, writs of error, and bills of review. * * * * Undoubtedly the mode pursued in this case of obtaining relief from the judgment of the Circuit Court of Preston county is in its form due process of law. It is by an appeal to the courts, in their regular course of procedure, and is not by any summary or unusual process applied to the determination of the rights of parties."

It is worthy of consideration that in this case the action to enjoin the judgment was in the *same* court in which

it was rendered. In the case at bar the action was in a special court of limited jurisdiction. The action was neither to review, to reconsider, to reverse, to modify nor to enjoin, but to nullify, and the procedure was *summary* and *unusual*. Indeed, so far as our observation goes, the Citizenship Court has not its like in all the history of American legislation.

(*g*). The case of Grisar vs. McDowell, (6 Wall., 363) was a controversy over a tract of land between Grisar and an officer in the army of the United States, who held the property under an order of the Secretary of War. The land was located in the City of San Francisco, and, on December 31, 1851, was, by order of the President, reserved from sale and set apart for public purposes.

The land in controversy was a portion of four square leagues, to which the City of San Francisco claimed title, as successor of a Mexican Pueblo, and which was granted to plaintiff by an ordinance of the city, on the 20th of June, 1855. The question before this court was, whether the United States or the City of San Francisco possessed any title to the land in controversy on the first day of January, 1855.

It was admitted that the city possessed such title as had been held by the Mexican Pueblo. Under

the Mexican law, towns, when once officially recognized, were entitled, for their benefit and that of their inhabitants, to land not to exceed four square leagues, which should be assigned to such Pueblo, upon its original establishment, or, afterwards, upon petition of its officers or inhabitants.

Until the lands were surveyed and assigned to the Pueblo, the right or claim was an imperfect one. It was a right which the government could refuse to recognize at all, or which it might recognize, burdened with such conditions as it saw proper to impose. "Even after the assignment, the interest acquired by the Pueblo was far from being an indefeasible grant, such as is known to our laws. The interest acquired amounted to little more than a qualified right to alienate portions of the land to its inhabitants for building or cultivation, or for public purposes. Even this limited right in disposition and use was in all particulars subject to the control of the government."

In the case under consideration, no assignment of the land had ever been made to the pueblo. This government succeeded to the rights of the Mexican government, and the claim of San Francisco to the land in question was, therefore, subject absolutely to such legislation as

Congress might enact. The plaintiff took possession, and was living on the land, when he was ousted by the defendant. In July, 1852, the city presented her claim to the four leagues of land to the Board of Land Commissioners, created under the act of March 3, 1851, and, in December, 1854, the board rendered its decision, confirming the city's claim as to a portion of the land (embracing the premises under consideration) and rejecting its claim as to the residue. An appeal was taken by both parties to the District Court. In February, 1857, the appeal on the part of the United States was withdrawn, and the city was offered leave to have the decree of the Board of Commissioners made the final decree of the District Court. She declined to accept this offer, however, but continued to prosecute her appeal for the residue of her claim to the four leagues, which, of course, kept the whole proceedings open. The case was still pending in the District Court when, on the first of July, 1864, Congress passed an act under which the case was transferred to the Circuit Court of the United States. That court on the 18th of May, 1865, confirmed the city's claim to the four square leagues, subject to certain exceptions, among which was such portions of land as

had been previously "reserved or dedicated to public uses by the United States." An appeal was taken from the decree of the Circuit Court to the Supreme Court, and while there pending, on the 8th day of March, 1866, Congress passed an act by which it granted to the city of San Francisco all the lands situated in the city limits, "subject, however, to the exceptions and reservations in the decree" of the Circuit Court.

On the trial of the case, the defendant sought to introduce the decree of the Circuit Court, as thus modified and confirmed by the Act of Congress. It was objected to, the plaintiff contending that when the United States in the District Court, withdrew its appeal from the Board of Commissioners, the controversy as between the United States and the City was closed; and second, that the appeal to the Supreme Court suspended the operation of the decree of the Circuit Court and took from it all efficacy, as evidence of title. With reference to the first contention, this court says:

> "In 1857, the Attorney General withdrew the appeal on the part of the United States, and in March following, the District Court, upon the stipulation of the District Attorney, ordered that appeal to be dismissed, and granted leave to the city to proceed

upon the decree of the board as upon a final decree. The counsel of the plaintiff contended that this decree closed the controversy between the city and the United States as to the land to which the claim was filed, but in this view they are mistaken. *Had the city accepted the leave granted, withdrawn her appeal, and proceeded under the decree, as final, such a result would have followed.* But this course she declined to take. She continued the appeal for the residue of her claim to the four square leagues. This kept open the whole issue with the United States."

In disposing of the second contention, this court used language that has evidently been misconstrued. Referring to the decree of the Circuit Court, this court says:

"But there is another and conclusive answer to the objection to the admissibility of the decree. By the action of Congress it had become, with some modifications, final. On the 8th day of March, 1866, which was previous to the trial of this action, Congress passed an act to quiet the title to certain lands within the corporate limits of the City of San Francisco. By this act, all the right and title of the United States to the land situated within the corporate limits of San Francisco confirmed to the city by the decree of the Circuit Court, were relinquished and granted to the city, and the claim of the city was confirmed, subject, however, to the reservations and exceptions designated in the decree, and upon

the trust that all the land, not previously granted to the city, should be disposed of and conveyed by the city, to parties in the *bona-fide* actual possession thereof. * * * * * * In the execution of its treaty obligation with respect to property claimed under the Mexican laws, the government may adopt such modes of procedure as it may deem expedient. It may act by legislation, directly upon the claims preferred, or it may provide a special forum for their determination, or it may require their submission to the ordinary tribunals. It is the sole judge of the propriety of the mode, and having the plenary power of confirmation, it may annex any condition to the confirmation of a claim arising upon an imperfect right which it may choose. It may declare the action of the special board final; it may make it subject to appeal; it may require the appeal to go through one or more courts, and it may arrest (not reverse) the action of the board or courts at any stage. The act of March 3, 1851, is a general act, applying to all cases, but the act of March 8, 1866, referring specially to the confirmation of the claim to lands in San Francisco, withdrew that claim as it then stood, from the further consideration of the courts, under the provisions of the general act. It disposed of the city's claim, and determined the conditions upon which it should be recognized and confirmed. The title of the city, therefore, rested upon the decree of the Circuit Court, as modified by the act of Congress."

By this act Congress did not undertake to *reverse* the decree of the Circuit Court, but simply withdrew it from further consideration by the courts. That is, it practically repealed the law allowing an appeal to the Supreme Court, and left the decree of the Circuit Court, as it were, in midair. However, Congress made the decree of the Circuit Court the *basis* of its act granting the lands to the city. The validity of the city's title did not rest upon the decree of the Circuit Court as a *decree*, but upon the *act of Congress*, which took the decree, modified it in some particulars, and made it the *legislative act*. The vitalizing force was not in the decree of the Circuit Court, but in the act of Congress. If, when the decree of the Circuit Court was rendered, its action had been final, it is respectfully submitted that Congress could not have modified or reversed it. The plaintiff had only such title as the city had. This title was confessedly an imperfect one. Congress had the right to determine for itself, in the first instance, whether the title remained in the United States or in the city. Likewise, it had the right to remit the determination of this question to the courts. It chose the latter course. While the cause was pending in the courts, and the question of

title was still in controversy, Congress chose to withdraw jurisdiction from the courts, to resume its original power, and to determine the matter for itself. If, before the passage of the act of March 8, 1866, the appeal had been finally determined in the Supreme Court, another question would have been presented. We submit that in the latter state of case, Congress would have found itself powerless to pass any act in derogation of the title thus established. The distinction is a plain one. Congress has the power, at any time *before* the action of the courts has become final, to resume its original plenary power. *After* the litigation has become final, however, it has passed beyond the control of Congress. In other words, Congress had the right to arrest the jurisdiction of this court before it had finally acted. It does not, however, possess the power, after the court has finally acted, to undo its work. This would be an encroachment upon the judiciary, that the courts will not tolerate. The cases of Hosmer vs. Wall, 97 U. S. 575, and Trenouth vs. San Francisco, 100 U. S. 251, grew out of Mexican land grants, and are in keeping with the doctrine announced in Grisar vs. McDowell.

(*h*). There is nothing in the opinion in La Abra Silver

Mining Company vs. United States, (175 U. S., 423) that operates against the contention we make. That case should be read in connection with Frelinghuysen vs. United States, (110 U. S,, 63) both of which are discussions of rights claimed by certain citizens of the United States, growing out of the convention between the United States and Mexico, entered into on the 4th day of July, 1868. This convention provided for the appointment of a commission to adjust all claims arising on the part of citizens of the United States against the Republic of Mexico, and all claims arising on the part of citizens of Mexico against the United States. It provided that the finding of said commission should be absolute and final between the two governments, that the total amount of claims awarded one government, should be set off against the total amount awarded the other, and that the difference should be paid in instalments of $300,000 to the government in whose favor the larger amount was awarded. It developed that the balance was largely in favor of the United States. The convention provided that the claims "should be heard upon such evidence and information only as should be furnished by or on behalf of the respective governments."

The La Abra Mining Company presented its claim for something less than $2,000,000, which grew, by different amendments, to practically $4,000,000. The government of the United States was awarded, on account of this claim, $683,000. After different payments had been made, the president called the attention of Congress to the fact that grave doubts existed as to whether or not the United States had, through the fraud of the claimant, been made the means of enforcing a fraudulent claim against the Republic of Mexico. On the 28th of December, 1892, Congress enacted that the Attorney General, in the name of the United States, should institute suit in the Court of Claims against the La Abra Silver Mining Company, for the purpose of determining whether or not the award had been procured through fraud and false practices. The Act provided that either party might take an appeal to the Supreme Court within thirty days from the final decree of the Court of Claims. The decree of the Court of Claims recited that the award of the La Abra Mining Company

> "Was obtained as to the whole sum included therein, by fraud, effectuated by means of false swearing and of false and fraudulent practices on the part of said Company and its agents, and adjudged that

the claim of said Company, both in law and equity, should be forever barred and foreclosed."

Among other contentions not material to a consideration of this case, the defendant contended that the Act of Congress was unconstitutional, because the action of the commission was final and conclusive; that the award made on account of the claim of the defendant, was defendant's property; that such award could not be set aside, reopened or vacated by a municipal court, and that its action was *res judicata*. Of course, this contention was not sustained. Justice Harlan, in delivering the opinion of the court, says:

"The money in the hands of the Secretary of State was paid to the United States by Mexico pursuant to the award of the commission. That tribunal dealt only with the two governments, had no relations with claimants, and could take cognizance only of claims presented by or through the respective governments. No claimant, individual or corporate, was entitled to present any demand or proofs directly to the commission. No evidence could be considered except such as was furnished by or on behalf of the respective governments. While the claims of individual citizens presented by their respective governments were to be considered by the commission in determining amounts, the whole purpose of the convention was to ascertain how much was due from one government to

> the other on account of the demands of their respective citizens. * * * * * As between the United States and Mexico, indeed as between the United States and American claimants, the money received from Mexico under the award of the commission was in strict law the property of the United States, and no claimant could assert or enforce any interest in it so long as the government legally withheld it from distribution."

It is made clear from this opinion, that the citizens of the United States were not parties to the award. The matters tried by the commission were questions solely between the two governments. As between these governments, the award was final and conclusive. The United States had the right, under the convention, to insist that the award was conclusive as against the Mexican government. It likewise had the right to waive the binding effect of this award, and agree that the matter might be retried.

> "Undoubtedly Congress, having in view the honor of the government and the relations of this country with Mexico, could have determined the whole question of fraud for itself, and by a statute approved by the president, or which, being disapproved by him, was passed by the requisite constitutional vote, have directed the return to Mexico, the other party to the award, of such moneys as had been paid into the hands of the Secretary of State."

Instead of exercising this power itself, Congress had the right to remit the determination of the whole question to its municipal courts, and this course it pursued. Having remitted it to the courts, Congress had the right, under its plenary power, at any time before the action of the courts became final, to withdraw it from their further consideration and resume its original authority. After the matter, however passed to final judgment in the courts, we submit that it was beyond the reach of Congress. To illustrate: Suppose that the Court of Claims had decided that the La Abra company's claim was free from fraud, and granted judgment in its favor. Suppose, further, that on appeal to the Supreme Court this decree had been affirmed. We submit that, in such event, the matter would have become *res judicata*. The company's claim to the amount of judgment would have become vested. Will it be contended that, after such affirmance on the part of this court, Congress could have lawfully created another subordinate tribunal and authorized it to set aside such judgment? We submit that the judgments and decrees of this court, though based upon matters over which Congress originally might have exercised plenary power, are beyond the constitutional reach of Congress.

(*i*) The case of Emblen vs. Lincoln Land Company, 102 Fed. Rep. 559, is in line with the decisions we have been examining. This was an action brought by Emblen against Weed, the purpose of which was to divest out of the defendant the title to certain lands to which he had received a patent from the United States, and to vest the title in the plaintiff. The act of May 14, 1880, (21 Stat. 140) provided that: "In all cases where any person has contested, paid the land office fees, and procured the cancellation of any pre-emption homestead, or timber culture entry, he shall be notified by the register of the land office, of the district in which such land is situated, of such cancellation, and shall be allowed thirty days from the date of such notice to enter said land." It appeared that the defendant had made a cash pre-emption entry of the land in controversy on September 19, 1885. On October 4, 1888, Emblen entered a contest, upon the ground that defendant had not complied with the requirements of the law with respect to residence, etc. The contest was dismissed, and on appeal to the Commissioner of the General Land Office, and from there to the Secretary of the Interior, John W. Noble, the action in dismissing the contest was affirmed. Subse-

quently Secretary Smith, who had succeeded Secretary Noble, ordered a rehearing of the whole controversy before the local officers. While the case was pending upon the order for rehearing, on December 29, 1894, Congress passed a law granting the land in controversy to the contestee Weed. In his bill the plaintiff contended that he paid the preliminary fee for filing the contest, and had a vested interest in the land, and that the act of Congress in attempting to convey it to another was unconstitutional. The court held, that Emblen's right to enter the land was based upon the condition that he first procure a cancellation of the defendant's entry. Not only had he failed to procure this, but his effort to secure such cancellation had been decided against him, and this decision had been affirmed by the Secretary of the Interior. It is true Secretary Noble's successor, Secretary Smith, attempted to grant a rehearing. This action, however, of Secretary Smith in attempting to revoke the order of his predecessor in office, was, under the decisions of this court void. In Noble vs. Railroad Company, 147 U. S. 165, this court had said :

> "A revocation of the approval of the Secretary of the Interior, however, by his successor in office,

> was an attempt to deprive the plaintiff of its property without due process of law, and was therefore void."

"As was said by Mr. Justice Greer, in U. S. vs. Store, 2d Wall, 525:

> "One officer in the land office is not competent to cancel or annul the act of his predecessor. That is a judicial act, and requires the judgment of a court."

It thus appeared not only that Emblen had failed to secure the cancellation of Weed's entry, but that his effort to procure such cancellation had been conclusively determined against him. Of course, in this state of case, the court could render no other judgment, than to dismiss his bill.

SEVENTH.

The proceedings in the Citizenship Court, whereby it undertook to vacate the decrees of the United States Courts, were not due process of law. The term "Due Process of Law" is incapable of accurate definition. It is not doubted that Congress may adopt new remedies and change existing methods of procedure, provided it does not violate fundamental principles. Discussing the meaning of the term in Den vs. Hoboken, (*supra*) Mr. Justice Curtis says:

"The constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will. To what principle, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be two-fold. We must examine the constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

This is perhaps as good a definition as can be given. Tested by it, the proceedings in the Citizenship Court fall far short of its requirements. That court, being one of limited jurisdiction, the ordinary rule which, in courts of general jurisdiction upholds their proceedings by the presumption of regularity, does not obtain. It could act

only in strict compliance with the statute creating it. (Galpin vs. Page, 18 Wall., 350). It was not given a free hand to determine the questions submitted to its jurisdiction, without reference to precedent. Sec. 33 of the act provides,

> "Except where herein otherwise expressly provided, the pleadings, practice and *proceedings* in said court shall conform, as near as may be, to the pleadings, practice and proceedings in equity causes in the Circuit Court of the United States."

No appeal was given from its decision, and therefore Congress hedged its jurisdiction with the proviso that it must be governed by the procedure that obtained in the Circuit Courts. The very moment it went beyond the power thus conferred, it acted without authority of law and its proceedings were unlawful. It is important, therefore, to inquire, whether the two questions submitted to the Citizenship Court, would have authorized the Circuit Court of the United States to vacate decrees admitting parties to citizenship. The jurisdiction of courts of equity to entertain bills to vacate the judgments of other courts, is well defined. The question has oftentimes been considered by this court, and the meat of all its decisions is contained in the statement of Justice Harlan, in Marshall vs. Holmes, (141 U. S., 589) where he says:

> "Any act which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery."

The decisions of the Federal Courts will be searched in vain for a case which holds that one court may vacate the judgment or decree of another court, unless, for some one of the reasons contained in the foregoing statement. Errors and irregularities in procuring a judgment or decree have never been held sufficient to vest another court with jurisdiction to vacate such judgment or decree. If it should be confessed that the United States Courts in the Territory should have served notice of the proceedings therein upon both Tribes, and that it should have confined its hearings to a review of the proceedings before the Dawes Commission, the most that could be claimed would be that those were simply errors of those courts, such as could be corrected by bill of review or other appropriate proceedings in the courts rendering them.

We believe we may confidently state that there is not a single authority in all the books that would authorize a

court of equity to vacate these decrees, because of the alleged errors.

The term "procedure" is a word of comprehensive meaning, (Kring vs. Mo., 107 U. S., 231).

The Citizenship Court was bound, under the law, to follow the procedure that would have obtained in the Circuit Court of the United States, sitting as a court of equity, under a similar state of facts. No Circuit Court would, for a moment, have entertained jurisdiction to vacate the decrees of the United States Courts in the Indian Territory upon such questions as were submitted to the Citizenship Court. Are we not, therefore, justified in stating, that it could have no jurisdiction to proceed, other than as a Circuit Court would have proceeded, and that its attempt to vacate the decrees of the Territorial courts was without jurisdiction, and void? There is no contention that the parties recovering these decrees were in any manner at fault. They followed literally the procedure mapped out for them by the Dawes Commission and by the courts wherein the decrees were rendered. There is no charge that they were guilty of misconduct or fraud. There is no charge that the Tribes were not permitted in the proceedings that resulted in these decrees, to urge as defenses,

the very questions that were submitted to the Citizenship Court. In the case of Freelan vs. Williams, (*supra*) where it was found that the acts upon which the judgment was based, were done in accordance with the usages of civilized war, Justice Miller makes this statement:

> "If it be true that, when the original action was presented to the Circuit Court of Preston county, the thing complained of was found to be an act in accordance with the usages of civilized war, during the existence of a war flagrant in that part of the country, that court should have proceeded no further, and its subsequent proceedings *may be held to have been without authority of law.*"

The Citizenship Court must be presumed to have known the law, and the very moment it appeared to that body that the questions submitted to it were not sufficient to authorize the Circuit Court of the United States to vacate decrees, under similar circumstances, it was its duty to dismiss the bill. It had no anthority or jurisdiction to proceed further, and its subsequent acts were void.

EIGHTH.

At the date of the passage of the act that created the Citizenship Court, July 1, 1902, Hill was in possession of the land in controversy. It had been more than four

years since the decree of the United States Court admitting him to citizenship. The lands of the Choctaw and Chickasaw Nations had been surveyed prior to the rendition of this decree. He had taken possession of this land, designating it as his allotment. During the time intervening between the date of his decree and the act creating the Citizenship Court, he was conceded to be a member of the Choctaw Tribe of Indians, and enjoyed all the rights and privileges of other members of the Tribe.

In the opinion of the Circuit Court of Appeals, it is held:

> "The judgments of citizenship rendered by the courts were conclusive upon the parties to them, in the absence of subsequent legislation; but, though final when rendered, they were voidable and reviewable by subsequent act of Congress passed before allotments of land were made them."

In view of this statement, it becomes important to determine the character of Hill's title, and when title acquired under the act of June 28, 1898, vested. That Hill had some kind of title to this land is beyond dispute. That this title would have been an indefeasible title in fee simple, if the Dawes Commission had discharged the minis-

terial duty that was imposed upon it of ratifying Hill's selection of his allotment, is equally clear. At the time the land was selected by Hill, he was, admittedly, a member of the Tribe. It being confessed that he was the owner of valuable improvements upon the land in question, it is clear that he had the right to make the selection. The facts being conceded, there was no matter of discretion left to the Dawes Commission. The authorities upon this question are too uniform to admit of doubt. Hill had done everything incumbent upon him to perfect his title. The act of June 10, 1896, required the Dawes Commission to place his name upon the roll of citizenship within six months, and to make him an allotment. He presented to that commission the decree admitting him to citizenship, asked enrollment, and requested the commission to set apart this land as his allotment. Can it be that, because the Dawes Commission, for more than four years, failed in the discharge of its duty, Hill's title to the land is to be defeated, when he had discharged every duty incumbent upon him to perfect that title? The case of Little vs. The State of Arkansas, 9 How. 314, is directly in point. Little, in an effort to perfect a homestead entry, had done everything incumbent upon him. Through the fault of

the officers of the government, he had not acquired the legal title. It was held, however, that he was not to suffer, because of the neglect of the officers of the government. Justice McLean says:

> "It is a well established principle that when an individual, in the prosecution of a right, does everything which the law requires him to do, and he fails to attain his right by the misconduct or neglect of the public officers, the law will protect him."

The act of June 28, 1898, provides:

> "That all the lands within the Indian Territory, belonging to the Choctaw and Chickasaw Indians, shall be allotted to the members of said tribes, so as to give *each member* of said tribes, so far as possible, a fair and equal share thereof, considering the character and fertility of the soil, and the location and value of the land."

What was the character of title conferred by this act? What is the character of title taken by members of the tribes, who procure their allotments under this act, and when does title vest in the allottee? At the date we are writing, practically all the members of the Choctaw and Chickasaw Tribes, whose rights to membership are not in dispute, have received their allotments. In many instances, the selections made by allottees have simply been ratified by the Dawes Commission. In many cases,

allotment certificates have been issued to the allottees, showing that parties are entitled to patents; while in a large number of cases patents have been executed by the Governors of the Choctaw and Chickasaw Nations, conveying the legal title to the allottees.

When does the allotment take place, so as to vest in the allottee title to the lands? Is the allotment made when the patent issues, or is it made when the Dawes Commission approves the act of a member of the tribe, in designating a particular tract of land as his allotment; or, did title vest at the date of the passage of the Curtis act? What is it that confers title upon the allottee? The title to these lands was never in the governors of the tribes, and, therefore, the patents that these two officers execute do not convey title. They are only an evidence that title has already passed. The Dawes Commission does not convey title, to allottees, because no title ever existed in that body. It has often been held by this court, that the legal title to these lands rested in the Indian governments, who held it in trust for the members of the tribes. The act of June 28, 1898, which provided for the allotment of lands, was ratified by the two Indian tribes. *It was that act that gave title.* It

can not be doubted that the title of those allottees who have received patents, takes effect by relation, as of the date of that act. Any other construction will lead to bewildering perplexities. Prior to the allotting act, the naked title to these lands was in the tribes. The *beneficial* title, however, the *actual ownership*, was in the members of the tribes, and they held, practically, as tenants in common.

> "At law, the trustee, as the holder of the legal title is the absolute proprietor of the estate, and he may exercise such powers as are conferred by legal ownership; but in equity, the *cestui que trust* is the *absolute owner*, and, in consequence, the trustee can deal with the estate only in such a manner as a court of equity will sustain." (Beech on Trust and Trustees, sec. 428).

As just stated, prior to the allotting Act, the interests held by the different members of these Tribes was a common one. When did this common holding cease? "Allotment is a setting apart and apportioning of the property formerly held by joint owners, so that each one may hold in severalty his own specific share." (Amer. and Eng. Enc. of Law, 2 ed., 151; Glenn & Glenn, 41 Ala., 577).

The allotting act converted the tribal property into individual property. Property that had theretofore been held

in common, was thereafter held in severalty. The fact, that each member of the Tribes had not made his individual selection, does not affect the question that *common ownership* had been destroyed, and *individual ownership* substituted. Necessarily, that is the only construction that can avoid utter confusion.

The Act of 1898 either *destroyed* the *community* of property theretofore existing among the members of the Tribes, or continued it as to *all* the members. Either, title to all members was conferred by that Act, or else no members' title can be completed until all the land is allotted. If A, B and C have a joint ownership in property, the very moment that the property is so apportioned as to vest in A title to any particular portion of the land, is title as to the other property necessarily ceases. No Indian who has received fee simple title to his allotment by issuance of patent or otherwise, can claim common ownership to the remaining portion of the Indian lands; and yet, this must result, unless it be admitted that the allotting Act itself converted common holdings into individual ownership; and, indeed, this is in accordance with the uniform holdings of this court.

The question of the effect of a treaty between the government and an Indian Tribe, providing for the allotment

of lands among the members of the Tribe, has been before the Supreme Court many times. It has, in every case, been held that the treaty converts the tribal property into *individual* property, and that the members of the tribe take, at the date of the treaty, a fee simple title to their share of the land, which title becomes definite and fixed as soon as the land is located.

This doctrine, first announced in the case of United States vs. Brooks, et al. 10 Howard, 442, has been consistently maintained in Doe vs. Wilson, 23 Howard, 457, Grews vs. Burcham, 66 U. S. 1 Black, 353, Best vs. Doe 10 Wall, 112, New York Indians vs. United States, 170 U. S. 1, and finally reaffirmed in Jones vs. Mehan, 175 U. S. 1.

It would extend this brief beyond the limits of moderation to examine, in detail, each of these cases. The case last cited is a luminous review of all the former decisions.

It construed a treaty between the United States and the Chippewa Indians, by the terms of which the Indians ceded to the United States certain lands in the State of Minnesota. The treaty provided for the allotment of 160 acres of land to each male adult, which was to be selected by the allottee. A reservation of 640 acres near the

mouth of the Thief river for the Chief Monsimoh was made in the treaty. The chief took possession of 640 acres of land near the mouth of Thief river, but died before the land was surveyed or allotted to him. After his death, his oldest son succeeded him as Chief of the Tribe, and a patent was issued by the Federal Government to the heirs of the elder Monsimoh. Under the law, all the title of the elder Monsimoh descended to the eldest son, who, in 1891, entered into a lease with the plaintiff for a portion of the land for a period of ten years, at an annual rent of $25. After the land was surveyed, young Monsimoh, treating the first lease as void, made a lease to the defendant for a term of twenty years, at an annual rent of $200. On August 4, 1894, Congress, treating the lease to the plaintiff as void, passed an act authorizing the Secretary of the Interior to approve the second lease, if he deemed it advisable, and upon such terms as he might impose. Thereupon the secretary approved the second lease, upon the condition that the annual rental should be $400. This was accepted by the defendant. The suit was a bill in equity, filed by the plaintiff, seeking to quiet his title to the land in controversy for the term of his lease—ten years. The Circuit Court held that the res-

ervation in the treaty to the elder Monsimoh, was in the nature of a grant of title to him, burdened with no restrictions or conditions, save that of selection and identification; that upon the selection and location, title in the land vested in the younger Monsimoh, as his eldest son and successor. That the latter's lease of November, 1891, to the plaintiff was a valid and substantial lease of the land in controversy, and needed no approval from the Secretary of the Interior. Mr. Justice Gray, in delivering the opinion of the Court, says: "The fundamental question in the case is, what was the nature of the title which the elder Chief Monsimoh took under the treaty of October 2, 1863, between the United States and the Red Lake and Pembina bands of Chippewa Indians. Was it a landed right of occupancy, with no power to convey the land except to the United States or by their consent? Or was it substantially a title in fee simple, with full power of alienation."

After analyzing the cases heretofore cited, the court continued: "The clear result of this series of decisions is that when the United States, in a treaty with an Indian Tribe, and as part of the consideration for the cession by the Tribe of a tract of country to the United States, makes

a reservation to a chief or other member of the Tribe, of a specific number of sections of land, whether already identified, or to be surveyed and located in the future, the treaty itself converts the reserved sections into individual property; the reservation, unless accompanied by words limiting its effect, is equivalent to a present grant of a complete title in fee simple." (Rutherford vs. Green's Heirs, 2 Wheat., 196; Hy-Yu-Tse-Mil-Kin vs. Smith, 194 U. S., 401).

Are we not justified in contending that the defendant took a vested interest to the land in controversy, and that this interest could not be divested, without compensation?

What is a vested right?

> "An estate is vested, when there is an immediate right of present enjoyment, or a present fixed right of future enjoyment." (4 Kent's Com., 202).

Mr. Justice Cooley says:

> "Rights are vested in contradistinction to being expectant or contingent. *They are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons, as a present interest.*"

Under these definitions, had not the defendant taken a vested interest in this land? He was a member of the

Choctaw Tribe of Indians; the Curtiss Act provided that he had the right to take his allotment where he owned improvements. He made his selection of the lands in controversy, and nothing remained to confer upon him the full legal title, except the issuing of a patent. Is not his case fully embraced within the definition that Kent gives of a vested right?

We call the court's attention to the case of Fletcher vs. Peck, (6 Cranch, 87). In this case, under the Act of the Legislature of Georgia, the governor granted certain lands to Gunn and his associates. A subsequent legislature repealed this act, upon the ground that the passage of the law had been secured through bribery. The grant had become effective, however, between the dates of the passage of the two acts, and the grantee had conveyed to innocent parties, portions of the land embraced in the original grant.

Chief Justice Marshall, in answering the contention, that the power of one legislature to repeal an act of a former legislature could not be abridged, says:

> "The correctness of this principle, so far as respects general legislation cannot be controverted, *but if an act be done under a law, a succeeding legislature cannot undo it.* The past can-

not be recalled by the most absolute power. Conveyances have been made; those conveyances have vested legal estates, and, if those estates may be seized, by the sovereign authority, still, that they originally vested is a fact, and cannot cease to be a fact. When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot devest those rights."

The decree of the United States Court, which the Act of Congress said should be final, assured the defendant that he was a member of the Choctaw Tribe of Indians. Acting upon the faith of this decree, he reduced the land in controversy to his possession, and expended thereon $1000. Being the owner of these improvements, the Curtis Act assured him, in the most solemn manner, that he might take his allotment upon this particular land. Believing in the integrity of the decree of the United States Court, and the integrity of Congress, he placed other improvements upon said land. He not only had a present right to the enjoyment of the land, but was actually enjoying the same. Beyond question, he was clothed with the equitable title to this property. Nothing remained to clothe him with the full legal title, except the discharge of a ministerial duty at the hands of the Dawes Commission.

Chief Justice Fuller, in his closing remarks in the

Stephens case, referring to the Act of June 28, 1898, uses the following significant language:

> "For reasons already given, we regard this act in general as not obnoxious to constitutional objection, but in so holding we do not intend to intimate any opinion as *to the effect that changes made thereby, or by the agreements referred to, may have, if any on the status of the several applicants, who are parties to these appeals.*"

Undoubtedly the Chief Justice had in mind the various decisions we have just cited, which sustain our contention, that the Curtis Act converted the Indian lands into private holdings, and vested the various members of the Tribe with title to their respective allotments. The language can mean nothing else.

The opinion in the Stephens case contains the following statement:

> "It may be remarked that the legislation seems to recognize, especially the act of June 28, 1898, a distinction between admission to citizenship merely, and the distribution of property to be subsequently made, as if there might be circumstances under which the right to a share in the latter would not necessarily follow from the concession of the former."

It is not clear to what portion of the act in question this language refers. That act provides that the lands

"Belonging to the Choctaw and Chickasaw Indians shall be allotted to the members of said Tribes so as to give *each member* of said tribes, so far as possible, a fair and equal share thereof."

It would seem that this statement in the opinion was an inadvertance, and that the allotting act contemplated that membership in either one of the tribes should carry with it the right to participate in the lands of the tribes. However this may be, the statement must be taken in connection with the question before the court. The court in that case was determining the *constitutionality* and not the *effect* of the allotting act.

In the concluding portion of the opinion heretofore referred to, the court expressly pretermits any opinion as to the ultimate effect of this Act. In that case the vital question, so far as the contentions of those who had procured decrees of citizenship were concerned, was, whether or not the Act of July 1, 1898, providing for an appeal to this court was constitutional. The right which was there claimed to be vested was *only the exemption of those decrees from review*. This is clearly shown by the following statement from the opinion:

"In its enactment Congress has not attempted to interfere in any way with the judicial department of the government, nor can the act be properly regarded as destroying any vested right, *since the right asserted to be vested is only the exemption of these judgments from review*, and the mere expectation of a share in the public lands and moneys of these Tribes, if hereafter distributed, if the applicants are admitted to citizenship, cannot be held to amount to such an absolute right of property that the original cause of action, which is citizenship or not, is placed by the judgment of a lower court, beyond the power of re-examination by a higher court though subsequently authorized by general law to exercise jurisdiction."

In any event, the entire litigation affecting questions of Indian citizenship, has been conducted upon the idea that membership in the Choctaw and Chickasaw Tribes necessarily carried with it a right to participate in the distribution of the tribal property. The decree of the Citizenship Court, that sought to vacate the decrees admitting parties to membership, was based wholly upon this contention, and we respectfully suggest that at this stage of the litigation, it should not be held that the decree admitting Hill to citizenship conferred no valuable property rights.

We respectfully submit that this cause should be re-

versed, with direction to dismiss the plaintiffs' complaint, and enter a decree confirming the defendant Hill, in his title to the land in question.

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